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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. T-00000A-97-0238 **NOTICE OF FILING**

Qwest Corporation ("Qwest") hereby submits its Brief in Support of its Showing of Compliance with the Track A Entry Requirements of 47 U.S.C. § 271(C)(1)(A) and the Public Interest Test of 47 U.S.C. § 271(d)(3)(C).

DATED this 19th day of September, 2001.

Respectfully submitted,

Qwest Corporation

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PUBLIC VERSION

QWEST'S BRIEF IN SUPPORT OF ITS SHOWING OF COMPLIANCE WITH THE TRACK A ENTRY REQUIREMENTS OF 47 U.S.C. § 271(c)(1)(A) AND THE PUBLIC INTEREST TEST OF 47 U.S.C. § 271(d)(3)(C)

September 19, 2001

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INTRODUCTION

Qwest Corporation ("Qwest") submits this brief to demonstrate that it has complied with the requirements of 47 U.S.C. §§ 271(c)(1)(A) and 271(d)(3)(C) in the state of Arizona. The first of these two sections of the Act (the "Track A requirements") requires Qwest to demonstrate that it has signed binding interconnection agreements with one or more facilities-based competitors — a category that includes competitors leasing unbundled network elements from Qwest — that collectively are providing telephone exchange service to business and residential customers in Arizona. The second section (the "public interest requirements") requires Qwest to show that it has opened its local exchange market and has provided adequate assurances that the market will remain open in the future, making the grant of its application consistent with the public interest. The Federal Communications Commission ("FCC") has found that compliance with the fourteen-point competitive checklist is a strong indicator that the market is now open, and that the presence of a performance assurance plan provides "probative evidence" that the market will remain open after grant of the application.[1] Despite the relentless efforts of intervenors, the FCC has never found any "unusual circumstances" that warrant a determination that a section 271 application is inconsistent with the public interest.

[1] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶¶ 423, 429 (1999) ("*Bell Atlantic New York Order*"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Both sections of the Act require Qwest to show that it has taken those actions within its control to enable competitors to enter its markets, if they so choose. Nothing in the Act or the FCC orders implementing the Act requires Qwest to ensure that its competitors actually enter any particular segment of the market on any given scale. Nor is Qwest obligated to guarantee that the individual business plans of competitive local exchange carriers ("CLECs") will turn a profit or satisfy prospective lenders or investors. As the FCC has emphasized:

> [P]ursuant to section 271(c)(2)(B) [the competitive checklist], the Act provides for long distance entry even where there is no facilities-based competition satisfying section 271(c)(1)(A) [Track A]. This underscores Congress' desire to condition approval *solely on whether the applicant has opened the door* for local entry through full checklist compliance, *not on whether competing LECs actually take advantage of the opportunity to enter* the market.[2]

According to the FCC, "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest,"[3] since it demonstrates that the Bell Operating Company ("BOC") has laid the preconditions for CLEC entry, regardless of whether the CLECs have chosen to enter.

Through its testimony, Qwest has demonstrated by a "preponderance of the evidence"[4] both that it has satisfied the Track A requirements and — assuming the Arizona Corporation Commission (the "Commission") finds in other workshops in this proceeding that Qwest has complied with the competitive checklist and adopted an adequate performance assurance plan —

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2 *Id.* at ¶ 427 (emphases added).

3 *Id.* at ¶ 422.

4 *Id.* at ¶ 48 ("[W]e reiterate that the BOC needs only to prove each element by 'a preponderance of the evidence,' which generally means 'the greater weight of the evidence, evidence which is more convincing than the evidence which is offered in opposition to it.'"). As the FCC has represented to the D.C. Circuit, "the burden of proof imposed on a BOC under section 271 does not require the BOC to produce evidence that eliminates all doubt in the record." Brief of Appellee, *Sprint Communications L.P. v. FCC*, No. 01-1076 (D.C. Cir. filed June 14, 2001).

that Qwest's entry into the long distance market would serve the public interest. With respect to the Track A requirements, Qwest demonstrated that it has signed binding interconnection agreements with multiple carriers that are collectively providing telephone exchange service for a fee to business and residential customers in Arizona using their own facilities or network elements leased from Qwest. And with respect to the public interest test, Qwest demonstrated that there are no "unusual circumstances" in Arizona that would overcome the checklist compliance's "strong indica[tion]" that Qwest's markets are now open, or the performance assurance plan's "probative evidence" that those markets will stay open after entry. In both cases, Qwest made exactly the type of showing that the FCC has required in its recent orders granting BOC applications for interLATA authority.

The CLECs have never attempted to rebut these showings directly. Indeed they give no more than lip service to the FCC orders defining the Track A and public interest requirements. Instead, they have counseled outright defiance of those orders urging this Commission to impose the very tests concerning CLEC market share, geographic scope, and CLEC profitability that the FCC has expressly rejected.[5] They have also used this these proceedings as a platform for demanding a grab-bag of regulatory requirements, such as access charge adjustments and structural separation, that the FCC has *never* required as a condition of section 271 approval. Finally, the CLECs attempt to blame Qwest for factors that are entirely beyond its control, such

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[5] For instance, WorldCom witness Don Price not only acknowledged in the workshop that the FCC has deemed many of the issues raised by the CLECs to be irrelevant as a matter of law, but also urged this Commission to ignore the FCC's orders outright: "[T]his Commission has to satisfy itself based on its review of whatever factors it deems relevant, not what the great white father in D.C. has set down, but what this Commission deems relevant as to what is in the public interest." Reporters' Transcript of Proceedings, *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Workshop 7 — 272, Public Interest, Track A, June 12, 2001 ("6/12/01 Tr."), at 340:22 to 341:1.

as the capital markets' turning sour on CLECs' business plans and the inherent difficulties in entering dispersed and rural markets. Qwest respectfully asks the Commission to find that Qwest has met all the requirements that the FCC has established and to reject the CLECs' attempts to invent new ones.

I. QWEST HAS SATISFIED ALL OF THE TRACK A REQUIREMENTS.

The Track A provision, 47 U.S.C. § 271(c)(1)(A), states as follows:

> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR. — A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 ... specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) ... but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

The FCC has interpreted this language to require a BOC to demonstrate four things: (1) that it has one or more binding agreements with CLECs that have been approved under section 252 of the Act; (2) that it provides access and interconnection to unaffiliated competing providers of telephone exchange service; (3) that these competitors collectively provide telephone exchange service to residential and business subscribers; and (4) that these competing providers offer telephone exchange service either exclusively or predominantly over their own telephone service facilities (which include the unbundled network elements ("UNEs") they lease from Qwest) in combination with resale.[6] During the workshop, the intervenors conceded that Qwest had fully

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[6] *See* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶¶ 62-104 (1997) ("*Ameritech Michigan Order*").

met its burden with respect to nearly every element of Track A and that only the level of business competition in Arizona remained at issue.[7] The only Track A issue that is disputed is the level of business competition. Nevertheless, without waiving the narrowing of the issues, and for both the sake of clarity and the Commission's convenience, Qwest will address each of the Track A requirements in turn, demonstrating that in fact Qwest has satisfied all of the elements of Track A, including its showing that Arizona CLECs provide far more than the *de minimis* number of business access lines required for section 271 approval.

A. Qwest Has Entered into One or More Binding Agreements That Have Been Approved Under Section 252.

During the workshop, no party challenged Qwest's satisfaction of the first element of Track A. To satisfy that element, an applicant must demonstrate by a preponderance of the evidence that it has "entered into one or more binding agreements that have been approved under section 252 ... specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities."[8] Section 252 of the Act in turn lays out the procedures and standards by which state commissions arbitrate and approve BOC–CLEC interconnection agreements. The FCC has affirmed that agreements approved by a state commission pursuant to section 252 are "binding" within the meaning of Track A in that they define the obligations of each party — specifically, the "rates, terms, and conditions under which

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[7] *See* 6/12/01 Tr. at 222:9-13. When asked what additional evidence was needed to demonstrate that Qwest had satisfied all of the Track A requirements, AT&T's representative said only that Qwest had not met its "burden with respect to identifying the number of business customers being served on a facilities basis in Arizona." *Id.* As shown in the text below, Qwest is not required to show, in order to satisfy Track A, the actual "number" of CLEC business customers being served on a facilities-bypass basis. *See infra* text accompanying notes 87-93. In fact, since only CLECs possess the actual number of facilities bypass lines they serve, every section 271 application approved by the FCC has had to rely on estimates. Therefore, Qwest need only show — as it has — that this number is not *de minimis*.

[the BOC] will provide access and interconnection to its network facilities."[9] The FCC has also made clear that individual state-approved agreements need not address every single one of the checklist items enumerated in section 271(c)(2) in order to count for Track A compliance: "[W]e find nothing in section 271(c)(1)(A) that requires each interconnection agreement to include every possible checklist item, even those that a new entrant has not requested, in order to be a binding agreement for purposes of section 271(c)(1)(A)."[10]

Qwest has shown, in full compliance with this first prong of Track A, that as of February 28, 2001, Qwest had entered into 56 binding and approved wireline interconnection agreements in Arizona pursuant to section 252 of the Act.[11] Another 38 interconnection agreements (including wireline, resale, wireless, paging, and EAS agreements) were pending Commission approval as of the same date.[12] In addition to these interconnection agreements with individual carriers, Qwest has submitted a comprehensive Statement of Generally Available Terms and Conditions ("SGAT") pursuant to 47 U.S.C. § 252(f) that contains terms, conditions, and prices applicable to the provision of all aspects of interconnections, including all checklist items.[13] The FCC has acknowledged that SGATs impose binding legal obligations on a BOC just as individual interconnection agreements do, and it has held that they can also be used to

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8 47 U.S.C. § 271(c)(1)(A).

9 *Ameritech Michigan Order* at ¶ 72.

10 *Id.*

11 *See* Affidavit of David L. Teitzel Re: Public Interest and Track A, Qwest Corporation (April 17, 2001), *In the Matter of U S West Communications, Inc.'s Compliance with Section 271 of Telecommunications Act of 1996*, Docket No. T-00000B-97-238, ("Teitzel Affidavit"), 7 Qwest 16 at Exhibit DLT-3. Qwest has also concluded another 59 approved resale, wireless, paging, and EAS agreements. *Id. See also* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C (listing all of the Arizona CLECs with which Qwest has active contracts, as of 12/31/00).

12 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

demonstrate compliance with section 271, even in a Track A application.[14] Finally, the Commission has also approved Qwest's terms of interconnection with CLECs, both in its cost docket review of Qwest's tariffs and in its review of interconnection agreements with CLECs, which contain the terms, conditions, and prices applicable to the provision of network interconnection, access to unbundled network elements, ancillary network services, and telecommunications services available for resale in Arizona.[15]

Qwest should therefore be deemed in full compliance with the first prong of 47 U.S.C. § 271(c)(1)(A).

B. Qwest Provides Access and Interconnection to Unaffiliated Competing Providers of Telephone Exchange Service.

No disputes that Qwest has satisfied the second element of Track A: that an applicant provide access and interconnection to "one or more *unaffiliated competing providers of telephone exchange service.*"[16] The FCC has determined that a CLEC qualifies as a "competing provider" so long as it provides service "'*somewhere in* the state'" — not necessarily throughout the state (or the BOC's service territory) as a whole.[17] As the *Ameritech Michigan Order* notes,

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13 *Id.* at 10:9-13.

14 *See Bell Atlantic New York Order* at ¶ 20 ("[T]he Commission must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a statement of generally available terms and conditions (SGAT), and that either the agreement(s) or general statement satisfy the 'competitive checklist.'"). *See also* Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 11 (2000) ("*SBC Texas Order*") (illustrating use of an SGAT — in this instance, an SBC SGAT known as T2A — to test compliance with the checklist requirements, rather than individual agreements).

15 *See* Teitzel Affidavit, 7 Qwest 16 at 10:13-18.

16 47 U.S.C. § 271(c)(1)(A) (emphasis added).

17 *Ameritech Michigan Order* at ¶ 76 (quoting H.R. Rep. No. 104-204, at 77 (1995))

the Act does not condition BOC entry into long distance upon CLECs' having achieved a ubiquitous presence throughout a state; both the House of Representatives and the Senate explicitly rejected amendments that would have imposed such geographic scope requirements.[18] The FCC has declared unequivocally that it "do[es] not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider."[19]

Nor must a CLEC gain any minimum market share before it may be deemed a "competing provider[]."[20] It is simply not a condition of finding Track A compliance that a certain level of competition exists on the ground in Arizona. The Senate specifically rejected language that would have required the BOC to prove that there are CLECs in operation that are "'capable of providing a *substantial* number of business and residential customers'" with service.[21] The FCC has spoken plainly on this point as well: "We have never required, however, an applicant to demonstrate that it processes and provisions a substantial commercial volume of orders, or has achieved a *specific market share* in its service area, as a prerequisite for satisfying the competitive checklist."[22] FCC Chairman Powell has recently emphasized that neither Track

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(emphasis added).

18 *Id.* at ¶ 76 and n.170.

19 *Id.* at ¶ 76.

20 *Id.* at ¶ 77 (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)); *see also* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 268 (2001) ("*SBC Kansas/Oklahoma Order*").

21 *Id.* at ¶ 76 and n.170 (quoting 141 Cong. Rec. S8319-26 (daily ed. June 14, 1995)) (emphasis added).

22 *SBC Kansas/Oklahoma Order* at n.78 (emphasis added) (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)). And in its most recent section 271 order, released just a few weeks ago, the FCC affirmed yet one more time that it "has never required . . . an applicant to demonstrate

A, the public interest requirement, nor any other part of section 271 imposes the type of market share test that the CLECs have urged in this workshop:

> Some of the critics wish it was a market share test. And I won't even opine on whether that's good or bad, but I know that was expressly rejected by Congress. It doesn't say if there aren't more than 10% of people in the market don't approve them. That's just not what 271 says. And I know that's what a lot of people wish it said. But it doesn't.[23]

Therefore, the Track A requirement is *not* a requirement that a certain level of competition exists in Arizona. As long as CLECs are "serving more than a *de minimis* number of end-users for a fee in their respective service areas," the FCC will "find that each of these carriers is an actual commercial alternative to the BOC" sufficient for the Track A requirement.[24]

Qwest has fully satisfied this element of Track A, a fact that no party has attempted to dispute. Confidential Exhibit DLT-1C, attached to David L. Teitzel's affidavit, provides a comprehensive list of the unaffiliated CLECs that are active in Arizona, with information regarding the type of facilities and services that each CLEC is purchasing from Qwest. That chart shows exactly what UNEs, LIS trunks, resale, and other interconnection services and facilities each CLEC was purchasing from Qwest as of December 31, 2000.[25]

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that it . . . has achieved a specific market share in its service area, as a prerequisite for satisfying the competitive checklist." Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001) at App. D n.27 ("*Verizon Connecticut Order*").

23 "Powell Defends Stance on Telecom Competition," *Communications Daily*, May 22, 2001, Vol. 21, No. 99 (2001 WL 5053238).

24 *Ameritech Michigan Order* at ¶ 78. To be clear, no particular amount of competition is required to comply with Track A. *Bell Atlantic New York Order* at ¶ 427. However, in Arizona there are actually many CLECs providing service to more than a *de minimis* number of customers.

25 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C.

The following summary, drawn in large measure directly from David L. Teitzel's affidavit[26] and the CLEC responses that Qwest has thus far received to its discovery requests, demonstrates that Qwest's competitors are in fact providing facilities-based (including UNE-based) competition in Arizona. The CLECs described below are operational and providing service for a fee to customers.[27] Qwest notes, however, that no Arizona CLEC has responded to Qwest's data request regarding the number of business access lines it provides in the state and that the level of business competition is the only issue that is contested by an party. Additionally, AT&T, Sprint, and Eschelon Telecom have refused to answer Qwest's data requests regarding the number of residential access lines they provide. As a result, Qwest cannot provide the exact number of business and residential access lines most of these carriers are providing over their own facilities in Arizona, nor the number of customers they are serving via facilities-based competition in the state.

A single CLEC's response to Qwest's request for data on residential services, together with that same CLEC's admissions during the workshop regarding business services, reveals that Arizona CLECs provide at least **[CONFIDENTIAL DATA BEGINS: XXXXX**

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26 *See generally* Teitzel Affidavit, 7 Qwest 16 at 13:1 to 27:17.

27 As shown in Confidential Exhibit DLT-1C to David L. Teitzel's affidavit, the CLECs surveyed in Section I.B represent only some of the CLECs that are operational and providing service for a fee to customers in Arizona. *See* Rebuttal Testimony of David L. Teitzel Re: Public Interest and Track A, Qwest Corporation (May 29, 2001), *In the Matter of U S West Communications, Inc.'s Compliance with Section 271 of Telecommunications Act of 1996*, Docket No. T-00000B-97-238, ("Teitzel Rebuttal"), 7 Qwest 17 at 14:12-14 ("Each of the CLECs identified in Confidential Exhibit DLT-1 as having interconnection agreements in effect with Qwest are commercial enterprises, are operational and are providing service for a fee."); 6/12/01 Tr. at 212:20-23 ("I should stress that [Confidential Exhibit DLT-1C] only shows those CLECs that are purchasing services from Qwest. Many more CLECs have interconnection agreements with us but have not yet begun to offer services and are not yet purchasing.") (testimony of David L. Teitzel).

CONFIDENTIAL DATA ENDS] facilities bypass access lines in the state.[28] Adding the number of facilities-bypass access lines of only one Arizona CLEC to the 17,186 unbundled loops Qwest leases to CLECs, as well as another 49,401 access lines provided via resale,[29] produces a conservative total of **[CONFIDENTIAL DATA BEGINS: XXXXX CONFIDENTIAL DATA ENDS]** CLEC access lines relevant for purposes of Track A. This partial count suffices by itself to satisfy the *de minimis* standard. Given the intensely competitive business market in the state, the true number is certainly far higher, since, other than the aforementioned admission of one CLEC in workshop testimony, the CLECs have refused to give Qwest any information regarding the number of business access lines they provide. As discussed below, estimates of CLEC access line totals derived from the two methodologies allowed by the FCC in prior section 271 applications indicate that the total number of CLEC access lines in Arizona is likely somewhere between 413,343[30] and 502,735.[31]

The remainder of this Section I.B will detail the activities of just some of the significant competitors operating in Arizona:

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28 These numbers reflect total access lines as of mid-June 2001. *See* Cox Arizona Telcom's Reponses to Qwest Second Set of Data Requests, *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, 7 Qwest 19 at 1 ("Cox Data Request"); 6/12/01 Tr. at 187:3-9 (Confidential Proceedings).

29 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-2C (giving the total number of lines provided to CLEC customers via resale, as of 2/28/01).

30 *See infra* text and charts accompanying notes 101-110 (discussing the LIS trunk methodology allowed by the FCC in approving SBC's section 271 applications in Texas, Kansas, and Oklahoma).

31 *See infra* text and charts accompanying notes 111-112 (discussing the E-911 listings methodology presented to the Commission in the August 23-24 open meeting and in the August 31, 2001, letter of Afshin Mohebbi, President & COO, Qwest Corporation. This E-911 methodology was also used by SBC and Verizon in their section 271 applications).

1. **Cox Communications.** Cox is currently offering Arizona customers integrated packages of television, local and long distance service, and Internet services.[32] Cox acknowledged in its response to Qwest's data request that it **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Arizona.[33] According to Cox, it provided approximately **[CONFIDENTIAL DATA BEGINS: XXXXX CONFIDENTIAL DATA ENDS]** residential access lines[34] to approximately **[CONFIDENTIAL DATA BEGINS: XXXXX CONFIDENTIAL DATA ENDS]** Arizona residential customers[35] via its own facilities as of June 5, 2001.[36] Moreover, Cox witness Brad Carroll noted in his live testimony that Cox's residential numbers had been "definitely increasing" in the first six months of 2001.[37] Mr. Carroll also acknowledged that Cox **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX[38] XXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX[39] CONFIDENTIAL DATA ENDS]**

32 *See* Teitzel Affidavit, 7 Qwest 16 at 17:13-15.

33 *See* Cox Data Request, 7 Qwest 19 at 1.

34 *Id.* at 1-2.

35 *Id.* at 2.

36 Cox witness Brad Carroll noted that 100% of Cox's services are provided over facilities owned by Cox: "We do not resell or utilize Qwest facilities in any manner." 6/12/01 Tr. at 185:2-3.

37 6/12/01 Tr. at 188:16-20.

38 *Id.* at 186:8-12 (Confidential Proceedings).

39 *Id.* at 187:3-9 (Confidential Proceedings).

Cox's Digital Telephone service is currently available in Chandler, Scottsdale, Peoria, and parts of North Phoenix,[40] and Cox recently received a license to offer that service to customers in Mesa City.[41] Cox's telephone service is already available to approximately 50,000 homes in West Mesa, but the Mesa City license will enable Cox to market the service to an additional 20,000 homes in that community.[42] The company also expects to have completed a rebuild of the East Valley by 2002, and most of that area should have service from Cox by the end of 2003.[43] Cox has committed millions of dollars over the next three years towards the installation of fiber optic facilities throughout the Valley.[44] Cox is already in the process of updating more than 8,000 miles of existing coaxial cable and installing 3,000 miles of new fiber-optic lines.[45] All told, the company plans to have its digital telephone service available to 600,000 homes by the end of this year.[46]

2. **AT&T**. AT&T has moved aggressively into the cable telephony market in recent years and is currently one of the largest CLECs in Arizona. In addition, AT&T's $11.3 billion takeover of Teleport Communications Group ("TCG"), approved by the FCC on July 23, 1998, provided it with direct access to the facilities-based local exchange and high capacity

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40 *See* Teitzel Affidavit, 7 Qwest 16 at 18:3-4 (citing "Cox Digital Telephone Service FAQ's," *available at* www.cox.com/Phoenix/telephone/FAQ's.asp).

41 *Id.* at 18:4-6 (citing "Digital Service Expands," *The Business Journal*, Mar. 9, 2001, at 23).

42 *Id.* at 18:6-10 (citing "Cox Expands E. Valley Phone Service," *The Tribune Newspaper*, Mar. 9, 2001, at B1).

43 *Id.* at 18:16-17, 19:1.

44 *Id.* at 19:4-6 (citing "Cox Digital Telephone Service FAQ's," *available at* www.cox.com/Phoenix/telephone/FAQ's.asp).

45 *Id.* at 19:6-8 (citing "Challenges For Cox," The Business Journal, Mar. 19, 2001, *available at* phoenix.bcentral.com/phoenix/stories/2001/03/19/story1.html).

46 *Id.* at 19:8-10.

markets in Phoenix and other major urban centers across the country.[47] AT&T stated at that time that the merger would enable it to sell packages of local, long distance, and data communications to businesses.[48]

AT&T/TCG currently offers facilities-based service in Phoenix, Chandler, Mesa, Tempe, Paradise Valley, Scottsdale, Tolleson, and Glendale.[49] The merger with TCG provided AT&T with access to TCG's 300 route miles of fiber in Phoenix and Tempe, the largest CLEC fiber network in Arizona.[50] The network is composed of 11 self-healing SONET (synchronous optical network) rings and is capable of providing facilities-based service to the majority of the business localities in the Phoenix metropolitan area.[51]

3. **WorldCom**. WorldCom has traditionally targeted large businesses for voice and data services, including local, long distance, and high capacity services,[52] and WorldCom witness Don Price has acknowledged that WorldCom is currently providing facilities-based local exchange service to business customers in Arizona.[53] Since 1995, when WorldCom's network in Phoenix first became operational in the city's central business district, the company has expanded to serve a number of other parts of the metropolitan area, including downtown Phoenix, Camelback Road/Indian School road area, Lincoln Road, Phoenix Sky Harbor International Airport, and Tempe.[54] The company has also built a small fiber network

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47 *Id.* at 13:2-5.

48 *Id.* at 13:8-10 (citing "AT&T's Teleport Takeover OK'd," *Arizona Republic*, July 24, 1998).

49 *Id.* at 14:6-8.

50 *Id.* at 13:16-17, 14:1-2.

51 *Id.* at 14:2-5.

52 *Id.* at 16:1-2.

53 *See* 6/12/01 Tr. at 242:10-18.

54 *See* Teitzel Affidavit, 7 Qwest 16 at 15:4-13.

(approximately 20-40 miles) in Phoenix's central business district to transmit voice and data traffic.[55]

WorldCom has also strengthened its position in several respects in the last few years. WorldCom acquired Brooks Fiber in 1997, enabling it to add 44 local facilities-based networks to its portfolio, and it received FCC approval for its $37 billion merger with MCI in September 1998.[56] In addition, the company announced in August 2000 that it had filed its first round of applications for authority to offer broadband fixed wireless services in more than 60 markets nationwide.[57]

4. **Sprint**. Sprint is currently providing local service to residential customers in the Phoenix area.[58] It began offering its ION service package in July 2000 and recently announced that it was expanding the service to include a package consisting of unlimited local telephone service, enhanced features such as Caller ID and voice mail, high-speed Internet access, and domestic long distance for a flat fee of $99.99 per month.[59] Sprint also announced in April of this year that it is introducing enhanced Sprint ION in Phoenix.[60] That service will give small businesses more flexibility in building customized voice and data services by offering an à la carte service structure; customers can build almost 180 different service plans using different

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55 *Id.* at 15:14-15.

56 *Id.* at 14:18-19, 15:1-3.

57 *See* "WorldCom Seeks Broadband Fixed Wireless Authority," Aug. 14, 2000, *available at* www.worldcom.com/about_the_company/press_releases/display.phtml?cr/20000814.

58 *See* Teitzel Affidavit, 7 Qwest 16 at 20:4-5.

59 *Id.* at 20:5-10 (citing "Sprint Expands its Ion Service," *The Tribune Newspaper*, Mar. 14, 2001 at B1-B2).

60 *Id.* at 20:14-16 (citing "Sprint Launches Enhanced ION, *XChange*, Apr. 2, 2001, *available at* www.x-changemag.com/hotnews/14h275636.html).

bundles of minutes for local, domestic long distance, international long distance, and data services on one to four voice lines.[61]

5. **Eschelon Telecom.** Eschelon, formerly known as Advanced Telecommunications, Inc., is an integrated communications provider of voice, data, and Internet services operating primarily in the northwest and southwest United States.[62] Eschelon focuses largely on small to medium businesses and provides a comprehensive line of telecommunications products and services, including local service.[63] Although Eschelon initially used only leased facilities to provide service, it recently began installing its own switches and other facilities.[64] Eschelon announced last fall that it had completed the installation of its network facilities in Phoenix, allowing it to offer voice, data, and Internet services over its own facilities.[65] Eschelon announced in April of this year that it was launching its full range of telecommunications services in Phoenix.[66]

Moreover, Eschelon and Qwest recently signed an agreement that will enable Eschelon to provide voice and data services to small and medium business customers via UNEs leased from Qwest.[67] This five-year agreement will enable Eschelon to sell additional features and

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61 *Id.* at 20:16-18, 21:1-2.

62 *Id.* at 22:2-5.

63 *Id.* at 22:5-7.

64 *Id.* at 22:7-8.

65 *Id.* at 22:9-12 (citing "Eschelon Telecom, Inc. Completes Installation of Network Facilities in Phoenix," *Businesswire*, Sept. 11, 2000, *available at* www.businesswire.com/webbox/bw.111300/203184909.htm).

66 *Id.* at 22:18-20, 23:1-2 (citing "Eschelon Telecom, Inc. Announces Expansion into Phoenix, Arizona," *Businesswire*, Apr. 21, 2001, *available at* www.businesswire.com/webbox/bw.042100/201124918.htm).

67 *Id.* at 23:3-5 (citing "Qwest Communications and Eschelon Telecom Announce $150 Million Wholesale Contract for Voice and Data Service," *Businesswire*, Nov. 16, 2000, *available at* www.businesswire.com/webbox/bw.111600/203214892.htm).

information services not offered by Qwest, such as voice messaging and DSL, and expand its market coverage within Qwest's fourteen-state region.[68]

6. **Electric Lightwave**. Electric Lightwave, Inc. ("ELI"), a subsidiary of Citizens Utilities Company, was one of the first providers of competitive services in the Phoenix area.[69] ELI holds itself out as a full-service provider, offering integrated communications service packages including local service, switched and dedicated long distance, private networks, advanced data and Internet access services, nationwide videoconferencing, and prepaid services to customers in Phoenix.[70]

In 1997, ELI entered into a strategic alliance with the Salt River Project ("SRP").[71] Under the terms of that agreement, ELI leased a substantial amount of dark fiber from SRP, and the combined ELI-SRP network now covers over 400 route miles and is capable of delivering facilities-based service to Phoenix, Tempe, Scottsdale, Chandler, and Gilbert.[72] ELI has also invested $37 million in new facilities in Phoenix.[73]

7. **XO Communications**. XO, formerly known as NEXTLINK, operates as a facilities-based provider in Phoenix and Tucson.[74] The company has established a high capacity metro fiber network in Phoenix designed to serve both downtown areas as well as other

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68 *Id.* at 23:5-9.

69 *Id.* at 16:4-7.

70 *Id.* at 17:6-11 (citing "About ELI," *available at* www.electriclightwave.com/about/index.shtml).

71 *Id.* at 16:10-11.

72 *Id.* at 16:11-15.

73 *Id.* at 16:15-16 (citing "Electric Lightwave Launches Competitive Local and Long Distance Telephone Service to Phoenix Businesses," May 28, 1998 *available at* www.eli.net/media/releases/phxswitch.shtml).

74 *Id.* at 23:11-12.

metropolitan and suburban areas.[75] XO aggressively markets data and voice services to small and medium-sized business customers: The company began offering customers an integrated, flat-rate package of local and long distance voice, Internet access, and web hosting services in September 2000.[76] XO is expanding rapidly and will begin to serve larger business customers as its network capacity increases.[77]

XO is also attempting to work with other carriers to finance the construction of a 32 mile fiber loop extending out from downtown Phoenix.[78] In addition to extending its market through partnerships with other providers, XO is deploying alternative technologies — for example, XO is planning to offer fixed wireless service in Tucson — to reach business where it is not economically feasible to construct a fiber network.[79] In fact, XO saw its overall revenue for voice services increase by 76.3% from 1999 to 2000.[80]

8. **e.spire**. e.spire, formerly known as ACSI, completed construction of its network serving Tucson's central business district in early 1996 and began offering local switched services in early 1997.[81] The Tucson network was one of e.spire's first and is therefore one of its most mature.[82] Before the rollout of those services, e.spire had also offered private line

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75 *Id.* at 23:12-14.

76 *Id.* at 23:14-18, 24:1-4.

77 *Id.* at 23:18, 24:1.

78 *Id.* at 24:4-7.

79 *Id.* at 24:15-19, 25:1-3.

80 *Id.* at 25:3-5.

81 *Id.* at 19:12-16.

82 *Id.* at 19:13-15.

and data services to large businesses in the greater Tucson area.[83] In fact, e.spire was the first facilities-based CLEC to offer local services to the Tucson business community.[84]

* * *

As demonstrated by this partial survey, Qwest provides access and interconnection to numerous unaffiliated competing providers in Arizona. And this survey is merely a sampling of the existing competitive market: there are other CLECs offering facilities-based service in the state. All CLECs have refused to answer Qwest's data requests regarding business access lines and customers in Arizona, and all but a handful have refused to answer data requests regarding their residential services. Additionally, Qwest has not seen any of the CLECs' responses to the data requests served by the Arizona Corporation Commission Staff on this topic. Therefore, Qwest cannot comment in this brief on the completeness or veracity of the responses or on their effect.

As noted, the FCC's only guideline is that CLECs "serv[e] more than a *de minimis* number of end-users for a fee in their respective service areas."[85] Even if no more data were collected, the numbers set forth above and the data on stand-alone unbundled loops[86] and UNE-P access lines in Section I.D demonstrate that the facilities-based CLECs active in Arizona are collectively providing service to far more than a *de minimis* number of customers. Therefore, Qwest has satisfied the second prong of the Track A test.

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83 *Id.* at 19:16-18.

84 *Id.* at 20:1-2.

85 *Ameritech Michigan Order* at ¶ 78.

86 The number of stand-alone unbundled loops (as of 2/28/01) is obtained by subtracting the number of UNE-P loops in service (653), *see* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3, from the total number of unbundled loops in service (17,186), *id.* at Confidential Exhibit DLT-3C. Thus, as of February 28, 2001, there were a total of 16,533 stand-alone unbundled loops in service in Arizona.

C. Unaffiliated Competitors Are Providing Telephone Exchange Service to Residential and Business Subscribers.

Section 271(c)(1)(A) further requires that the competitors described above provide "telephone exchange service . . . *to residential and business subscribers.*"[87] CLECs have challenged only Qwest's showing that Arizona CLECs provide services to more than a *de minimis* number of business customers in the state, while at the same time refusing to provide responses to Qwest's data request on this issue. This transparent attempt to stymie Qwest's demonstration of compliance has not succeeded, however. The available evidence shows overwhelmingly that Qwest has satisfied this element of Track A.

The FCC has made clear that the relevant question is whether the CLECs in a state are *collectively* serving both residential and business customers, not whether any single carrier is serving both groups.[88] Congress specifically amended the Act to "eliminat[e] the requirements that *one carrier* serve *both* residential and business customers, and allow[] instead, multiple carriers to serve such subscribers."[89] The FCC has continued to follow this position, most recently in its order granting Verizon's section 271 application for Connecticut.[90] Therefore, so long as residential and business customers are being served in a state — by one CLEC or by some combination of CLECs — this requirement of Track A is satisfied.

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87 47 U.S.C. § 271(c)(1)(A) (emphasis added).

88 *See Ameritech Michigan Order* at ¶ 82. *See also* 6/12/01 Tr. at 209:12 to 210:10 (explaining that it is not necessary under Track A to demonstrate that a single CLEC is serving both residential and business customers) (testimony of David L. Teitzel).

89 *Id.* at ¶ 84 (emphases added).

90 *See Verizon Connecticut Order* at App. D ¶ 15; *see also* Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services*

As discussed in detail in the previous section and demonstrated in the workshop testimony, CLECs are collectively providing telephone exchange service to residential and business subscribers in Arizona.[91] Faced with Qwest's evidence regarding the number of residential access lines served by CLECs in the state, the intervenors conceded in the workshop that residential access lines were no longer at issue and that Qwest had fully met its burden in this regard.[92] The only remaining issue, therefore, was whether CLECs in Arizona were providing more than a *de minimis* number of business access lines. They plainly are. The number of unbundled loops discussed in Section I.D is enough by itself to satisfy this requirement. David L. Teitzel's survey of the well-known and well-advertised business services of CLECs in Arizona also shows that CLECs are, in fact, also serving business customers over a large number of access lines in Arizona. That showing should soon be confirmed beyond doubt — if it has not already — by the CLECs' responses to the Commission's data requests.

Finally, although no such showing is required for section 271 approval, Qwest also has adduced evidence demonstrating that individual CLECs are, in fact, simultaneously providing both business and residential services in Arizona. As noted above, Cox Arizona Telcom's witness Brad Carroll testified in the workshop that Cox actually provides approximately **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** business access lines over its own facilities in Arizona.[93] Qwest is therefore in

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in Massachusetts, 16 FCC Rcd 8988, ¶ 223 (2001) ("*Verizon Massachusetts Order*").

91 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C (summarizing the services being purchased from Qwest and offered by CLECs in Arizona as of 12/31/00); *id.* at 31:17 to 33:4.

92 *See* 6/12/01 Tr. at 199:15-25 (acknowledging that the sufficiency of Qwest's showing regarding CLEC residential access lines in service in Arizona was no longer at issue) (statement of David Harmon).

93 *Id.* at 186:3 to 187:9 (Confidential Proceedings); *see also* Confidential Exhibit 7 Qwest

compliance with the third element of 47 U.S.C. § 271(c)(1)(A).

D. Competitors Are Providing Telephone Exchange Service Either Exclusively over Their Own Telephone Exchange Service Facilities or Predominantly over Their Own Telephone Exchange Service Facilities in Combination with Resale.

No party has challenged Qwest's compliance with the fourth element of the FCC's Track A test, which requires that the competing providers offer telephone exchange service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[94] The FCC has made clear that a CLEC's "'own telephone exchange service facilities'" in this context include the UNEs it leases from the incumbent.[95] Moreover, the FCC has determined that this element of Track A is satisfied even if only one CLEC in a state is offering service exclusively or predominantly over its own facilities; it need not be the case that other CLECs (or all CLECs) use their own facilities as well.[96]

The carriers identified in Section I.B are indeed providing service over "their own telephone exchange service facilities," as the FCC defines that phrase. First, more than one carrier in Arizona has leased unbundled loops from Qwest, which are deemed the CLECs' "own . . . facilities" under the FCC's rules: according to Qwest's most current data, there were 17,186 unbundled loops in service and 16 CLECs using unbundled loops in Arizona as of

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19 at 1.

94 47 U.S.C. § 271(c)(1)(A).

95 *Ameritech Michigan Order* at ¶ 99.

96 *Id.* at ¶ 104 (determining that because one CLEC was offering service exclusively over its own facilities, the BOCs' interconnection agreement with that CLEC satisfied the statutory requirement and made it unnecessary to examine whether additional interconnection agreements

February 28, 2001.[97]

These unbundled loop numbers greatly understate the amount of own-facilities competition in Arizona. The CLECs serve a significant number of customers by bypassing Qwest's network entirely, and Qwest is unable to measure exactly how many customers or access lines are being served in this fashion. However, even the handful of CLEC data request responses received by Qwest illustrate how understated these numbers really are. Just taking the data request response of a single CLEC, Cox Telecom, yields at least **[CONFIDENTIAL DATA BEGINS: XXXXX CONFIDENTIAL DATA ENDS]**[98] own-facilities bypass lines in service in Arizona. Complete responses from all CLECs will surely reveal many more.

As noted in the workshop, only the CLECs have full information on their facilities bypass activities.[99] While Qwest can actually measure and track the number of unbundled stand-alone loops, UNE-P lines, and resale lines that it provisions to CLECs (as well as LIS trunks in service, numbers ported to CLECs by Qwest customers, and CLECs' E-911 listings), Qwest must still estimate the total number of CLECs' full facilities bypass lines. Unfortunately, that has not happened in the present case. To begin with, Qwest was able to serve formal discovery only on those CLECs that intervened and became parties to this proceeding. And the CLEC parties constitute only a small subset of the CLECs actually operating in Arizona. Furthermore, of the CLECs that were served, not a single one has provided Qwest with data concerning their business access lines and customers in Arizona, and only a few have given data regarding

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with other CLECs also satisfied the requirement).

97 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3. *See also id.* at Confidential Exhibit DLT-1C (identifying the CLECs using unbundled loops in Arizona, as of 12/31/00).

98 *See* Cox Data Request, at 1-2.

99 *See* 6/12/01 Tr. at 217:20-23 ("[O]nly CLECs can know with certainty the number of lines they are serving on a full bypass basis without using Qwest's loops in some way. Only

residential services. Qwest therefore offers the results of two established estimation methodologies.[100] First, Qwest offers the LIS trunk methodology that the FCC permitted SBC to use in Texas, Kansas, and Oklahoma. SBC assumed that CLECs serve 2.75 access lines through full facilities bypass for every interconnection (LIS) trunk they obtain.[101] Exhibit DLT-3, attached to David L. Teitzel's affidavit, presents the number of LIS trunks Qwest had provisioned to CLECs as of February 28, 2001.[102] Taking that number and multiplying by 2.75 produces the estimate of CLEC full facilities bypass lines in service. Since LIS trunks are used only for stand-alone unbundled loops and full facilities bypass lines, it is necessary to add the actual number of UNE-P lines in service to obtain an estimate of CLEC facilities-based lines, and then to add the actual number of resale lines served by CLECs to calculate the total number of access lines provided by CLECs to customers in the state. The following chart presents the LIS trunk estimate of CLEC facilities-based lines in service:

CLECs have that information.") (testimony of David L. Teitzel).

100 Based on the fact that at the workshop the Commission Staff agreed to serve data requests on all CLECs, Qwest postponed presentation of its ported number estimation methodology until Qwest could review the responses to Staff's data requests. To this date, the responses still have not been provided to Qwest. Therefore, as agreed, the ported number methodology is not presented in this brief.

101 *See SBC Kansas/Oklahoma Order* at ¶ 42 & n.96; Affidavit of John S. Habeeb, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas,* CC Docket No. 00-4 (Jan. 10, 2000), App. A, Vol. A-1 as Tab 1, at ¶¶ 23-24 (brief in support of SBC). *See also* Teitzel Affidavit, 7 Qwest 16 at 30 n.69.

102 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3. LIS trunks are synonymous with "Total Interconnection Trunks in Service" (as reported in Exhibit DLT-3).

Estimated Competitive Facilities-Based Lines in Service (as of 2/28/01) (LIS Trunk Method)

Interconnection (LIS) trunks in service[103]		132,105
SBC ratio of CLEC facilities bypass lines to LIS trunks in service	x	2.75
Estimated number of CLEC full facilities bypass lines[104]		363,289
UNE-Platform lines in service[105]		653
Estimated number of CLEC facilities-based access lines[106]		363,942[107]

This approach indicates that Arizona CLECs are serving the market using a substantial quantity of their own telephone exchange service facilities. Adding to this estimate (363,942) the actual number of access lines CLECs in Arizona provide to customers via resale produces the following estimate of CLEC access lines in service:

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103 *Id.* LIS trunks are used for CLEC full facilities bypass lines and stand-alone unbundled loops, but not for UNE-P loops or resale lines.

104 Results are rounded to the nearest whole number.

105 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

106 Results are rounded to the nearest whole number.

107 A letter Qwest sent to this Commission on August 31, 2001, and subsequently served on all parties to these proceedings, presents the updated number of LIS trunks Qwest had provisioned to CLECs as of June 25, 2001 (160,574). Plugging this number into the LIS trunk formula indicates that the number of facilities-based access lines had grown to 441,579 in the intervening four months. *See* Letter of Afshin Mohebbi, President & COO, Qwest Corporation to the Arizona Corporation Commission, August 31, 2001, at n. 3 ("Mohebbi Letter").

Estimated Competitive Access Lines in Service
(as of 2/28/01) (LIS Trunk Method)

Estimated number of CLEC facilities-based access lines[108]	363,942
Resold access lines[109]	49,401
Estimated number of CLEC access lines in service[110]	413,343

E-911 listings for CLECs is an additional estimation method that has been presented to the Commission.[111] The E-911 listings include stand-alone unbundled loops and CLEC full facilities bypass lines, but they do not account for UNE-P lines or resale lines provided to CLECs' customers. Based on the number of CLEC 911 listings in Arizona, this formula produces an even higher estimate of CLEC facilities-based access lines and reinforces the significance of CLECs' competitive presence in the state:

Estimated Competitive Facilities-Based Lines in Service
(as of 6/30/01) (E-911 Listings Method)[112]

CLEC E-911 listings	457,111
UNE-Platform lines in service	16,041
Estimated number of CLEC facilities-based access lines	473,152

108 Results are rounded to the nearest whole number.

109 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-2C.

110 Results are rounded to the nearest whole number.

111 *See* Mohebbi Letter at 1-2 & n.2. *See also SBC Texas Order* at ¶ 5 & n.7 (noting estimates of CLEC facilities-based access lines in the state derived from the number of E-911 listings); *SBC Kansas/Oklahoma Order* at n.96 (acknowledging use of the E-911 listings methodology).

112 *See* Mohebbi Letter at 1-2 & n.2.

Adding the total number of access lines provided to CLECs' customers via resale, the following chart provides the estimated number of CLEC access lines in service.

Estimated Competitive Access Lines in Service (as of 6/30/01) (E-911 Listings Method)[113]

Estimated number of CLEC facilities-based access lines	473,152
Resold access lines	29,583
Estimated number of CLEC access lines in service	502,735

Given these estimates of CLEC access lines in Arizona, it is undeniable that CLECs are serving large numbers of residential and business customers over their own facilities in this state.

Accordingly, Qwest has satisfied all four prongs of the Track A requirements in Arizona.

II. QWEST'S ENTRY INTO THE INTERLATA MARKET IN ARIZONA IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.

An applicant for section 271 authority must demonstrate that "the requested authorization is consistent with the public interest, convenience, and necessity."[114] The FCC's orders make clear that the public interest inquiry is neither a standardless exercise nor an open invitation for CLECs to submit their wish lists. The public interest analysis should focus on whether the local market is open to competition and whether there is adequate assurance that the local market will remain open after the section 271 application is granted. The FCC has repeatedly held that "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is

113 *See* Mohebbi Letter at 1-2 & n.2.

114 47 U.S.C. § 271(d)(3)(C).

consistent with the public interest."[115] The public interest inquiry is simply "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[116] While the public interest test looks beyond checklist compliance, however, the test cannot be used to impose an unrestricted wish list of regulatory obligations on Qwest, or to authorize a standardless gut call on whether entry is justified. The FCC has held that a BOC's entry into the long distance market, once it has met the checklist, would be contrary to the public interest only in "*unusual* circumstances."[117] Indeed, the FCC has *never* rejected a section 271 application on these grounds where the BOC has met the checklist requirements.

There are three parts to the FCC's section 271 public interest inquiry. First, the FCC determines whether granting the application "is consistent with promoting competition in the local and long distance telecommunications markets," giving substantial weight to Congress's presumption that when a BOC is in compliance with the competitive checklist, the local market is open and long-distance entry would benefit consumers.[118] Second, the FCC looks for assurances that the market will stay open after a section 271 application is granted. In this analysis, the FCC reviews the BOC's performance assurance plan (if the BOC has adopted one) and other available enforcement tools to be sure the BOC "would continue to satisfy the requirements of section 271 after entering the long distance market."[119] Finally, the FCC

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115 *Bell Atlantic New York Order* at ¶ 422. *See also SBC Kansas/Oklahoma Order* at ¶ 268 (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist").

116 *Verizon Connecticut Order* at Appendix D ¶ 72.

117 *Id.* (emphasis added).

considers whether there are any remaining "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications."[120] Qwest addresses each step in turn.

A. Qwest's Application Is Consistent with Promoting Competition in Both the Local and Long Distance Markets in Arizona.

1. ***The Local Market.*** Qwest's compliance with the elements of the Act's competitive checklist in Arizona is the subject of a series of other workshops. Therefore, the complaints from AT&T, WorldCom, e.spire Communications, and Cox Arizona Telcom concerning Qwest's compliance with particular interconnection duties or checklist compliance are appropriately considered elsewhere. Should the Commission find that Qwest has met the checklist requirements in Arizona, that finding is of significant probative value, since checklist compliance "is, itself, a strong indicator that long distance entry is consistent with the public interest."[121]

As the FCC has held, nothing in the Act requires a BOC to prove that CLECs have in fact entered the market in any significant number or achieved a particular level of market penetration:

> Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here. Moreover, pursuant to section 271(c)(2)(B) [the competitive checklist], the Act provides for long distance entry even where there is no facilities-based competition satisfying section 271(c)(1)(A) [Track A]. This underscores Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market.[122]

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118 *SBC Kansas/Oklahoma Order* at ¶ 268.

119 *Id.* at ¶ 269.

120 *Id.* at ¶ 267; *see also id.* at ¶¶ 281-82.

121 *Bell Atlantic New York Order* at ¶ 422; *see also SBC Texas Order* at ¶ 416.

122 *Bell Atlantic New York Order* at ¶ 427 (footnotes omitted).

Accordingly, Qwest is not *required* to demonstrate that CLECs have actually entered its market in order to obtain section 271 approval. Nevertheless, the evidence presented in the Arizona workshop *does* establish that CLECs are in fact walking through Qwest's open door and requesting (and receiving) interconnection. As of February 28, 2001, Qwest had entered into a total of 56 wireline interconnection agreements (including opt-ins) with CLECs in the state; 18 wireless, paging, and EAS interconnection agreements; and 41 additional resale interconnection agreements (for a total of 115 approved interconnection agreements).[123] And as of that same date, there were also 38 additional interconnection agreements pending between Qwest and CLECs in Arizona.[124] All in all, Qwest is actively interconnecting with at least **[CONFIDENTIAL DATA BEGINS: XX CONFIDENTIAL DATA ENDS]** CLECs.[125]

Under these agreements, Qwest had completed 455 CLEC collocations as of February 28, 2001,[126] and some 23 CLECs were using 132,105 local interconnection (LIS) trunks to interconnect with Qwest.[127] On this date, Qwest also was provisioning 17,186 stand alone unbundled loops, as well as 653 UNE-P lines, to 16 different Arizona CLECs.[128] And the CLECs are clearly using these interconnections and unbundled loops to provide services. In January 2001, a total of 1,123,624,413 minutes of use were exchanged between CLECs and Qwest in Arizona.[129]

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123 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

124 *Id.* This figure includes pending wireline, resale, wireless, paging, and EAS interconnection agreements, as well as opt ins.

125 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C (as of 12/31/00).

126 *Id.* at Exhibit DLT-3.

127 *Id.*

128 *Id.*

129 *Id. See also* Teitzel Affidavit, 7 Qwest 16 at 38:8-10.

Using the LIS-trunk method to estimate CLECs' full facilities bypass lines that the FCC allowed in the *SBC Texas* and *SBC Kansas/Oklahoma* decisions (and again adding actual counts of UNE-P loops and resold lines) yields CLEC market shares that support robust competition in Arizona:

CLEC Market Share Estimates: LIS Trunk Method (as of 2/28/01)

Estimated number of CLEC full facilities bypass lines using LIS trunk methodology (Number of LIS trunks x 2.75)[130]	363,289
UNE-Platform lines in service[131]	653
Resold access lines[132]	49,401
Total CLEC access lines in Qwest territory (equals the sum of the first three lines)	413,343
Total Qwest access lines in Qwest territory[133]	2,895,794
Total CLEC + Qwest access lines in Qwest territory (equals the sum of the fourth and fifth lines)	3,309,137
% CLEC access lines (equals line 4 divided by line 6)	12.5%[134]

Because they were calculated using the same methodology that SBC used, these latter numbers can be compared to the market shares that existed in Texas, Kansas, and Oklahoma when the FCC granted SBC's section 271 application for those states. It is clear that there has been significantly greater entry in Arizona than existed in Oklahoma (estimated 5.5 to 9.0 percent) and

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130 *See supra*, "Estimated Competitive Bypass Lines in Service (LIS Trunk Method) (as of 6/25/01)," line 1 of chart accompanying note 103. LIS trunks are used for CLEC full facilities bypass lines and stand-alone unbundled loops, but not for UNE-P loops or resale lines.

131 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

132 *Id.* at Confidential Exhibit DLT-2C.

133 *Id.*

134 Plugging the data from June 25, 2001 into the LIS trunk calculation indicates that CLECs' market share has grown to 14.4% in the intervening four-month period. *See* Mohebbi Letter at n.2.

Kansas (estimated 9.0 to 12.6 percent) when SBC's application was granted.[135] Indeed CLEC market shares in Arizona substantially exceed the shares that existed in Texas (8.0 percent)[136] — even though Arizona is a far smaller state with only 24.6 percent of the population of Texas.[137]

Application of the E-911 listings method that has been presented to the Commission produces even higher numbers:

CLEC Market Share Estimates: E-911 Listings Method (as of 6/30/01)

CLEC E-911 listings[138]	457,111
UNE-P lines provisioned to CLECs[139]	16,041
Resold access lines[140]	29,583
Total CLEC access lines in Qwest territory (equals the sum of the first three lines)	502,735
Total Qwest retail access lines in Qwest territory[141]	2,888,526
Total Qwest and CLEC access lines in Qwest territory (equals the sum of the fourth and fifth lines)	3,391,261
% CLEC access lines (equals line 4 divided by line 6)	14.8%

135 *See SBC Kansas/Oklahoma Order* at ¶¶ 4-5.

136 *See SBC Texas Order* at ¶ 5 & n.7.

137 As of April 2000, the total population of Arizona was 5,130,632, versus 20,851,820 for Texas. *See* United States Census Bureau, "Ranking Tables for States: Population in 2000 and Population Change from 1990 to 2000 (PHC-T-2)," *available at* www.census.gov/population/cen2000/tab02.pdf.

138 *See* Mohebbi Letter of 8/31/01 at n.2.

139 *Id.*

140 *Id.*

141 *Id.*

Finally, other measures also confirm that retail customers in Arizona are moving to CLECs in ever-larger numbers. As of February 28, 2001, there were 105,373 CLEC white pages listings in Qwest directories in Arizona.[142] And as David L. Teitzel noted in his affidavit in this proceeding, Qwest's records show that it lost significant numbers of residential and business accounts and corresponding access lines to CLECs during the year 2000 alone:

- Residential Accounts 14,192
- Residential Access Lines 17,246
- Business Accounts 3,746
- Business Access Lines 11,243.[143]

These figures, together with the preceding data, demonstrate clearly that not only has Qwest opened the local market in Arizona, but that actual competition is in fact robust.

2. ***The Long Distance Market.*** Just as the FCC (following Congress's intent) presumes that the local market is open if the BOC has complied with the competitive checklist, it also presumes that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist."[144] Once a BOC proves that it has complied with the competitive checklist, it is "not require[d] . . . to make a substantial *additional* showing that its participation in the long distance market will produce public interest benefits."[145] The FCC takes that as

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142 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

143 *Id.* at 31:7-13.

144 *Bell Atlantic New York Order* at ¶ 428; *SBC Texas Order* at ¶ 419; *SBC Kansas/Oklahoma Order* at ¶ 268.

145 *Bell Atlantic New York Order* at ¶ 428 (emphasis in original).

given: "As a general matter, we believe that additional competition in telecommunications markets will enhance the public interest."[146]

Congress has also recognized the benefits to consumers of having BOCs enter the long distance market once their local markets are open, and the FCC has noted "Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity" in such numbers as to make long distance entry somehow justified.[147] The D.C. Circuit has likewise cautioned against misreading section 271 to impose unnecessary bars against BOC entry:

> The Commission must be equally careful to ensure . . . that BOCs that satisfy the statute's requirements are not barred from long distance markets. Setting the bar for statutory compliance too high would inflict two quite serious harms . . . . First, it would dampen every BOC's incentive to cooperate closely with state regulators to open its local markets to full competition . . . Second, setting the bar too high would simultaneously deprive the ultimate beneficiaries of the 1996 Act — American consumers — of a valuable source of price-reducing competition in the long distance market.[148]

Independent studies continue to confirm that the benefits to consumers are substantial. A May 2001 study by the Telecommunications Research Action Center ("TRAC") demonstrates that

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146 *Id.* In direct contradiction to the FCC's procompetitive stance, AT&T argues that allowing Qwest to offer one-stop shopping, or packaged local and interLATA service, will result in a new Qwest monopoly. *See* Affidavit of Mary Jane Rasher Regarding Track A and Public Interest (May 17, 2001), *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, 7 AT&T 2 at 11 ("Rasher Affidavit"). The FCC has specifically rejected this argument. *See Bell Atlantic New York Order* at ¶ 428 (finding that BOC bundling of local and interLATA services presents no concerns when the BOC is in compliance with the competitive checklist, and finding that the BOC's entry into long distance promotes consumers' interests). Ms. Rasher's suggestion that consumers should be denied the benefits of increased interLATA competition simply to give CLECs an artificial competitive advantage over Qwest is entirely alien to Congress's design.

147 *Bell Atlantic New York Order* at ¶ 427.

148 *AT&T Corp. v. FCC*, 220 F.3d 607, 632-33 (D.C. Cir. 2000) (quotation marks omitted).

New York consumers will save up to $284 million annually on long distance telephone service as a result of BOC entry into the interLATA market in that state.[149] There is every reason to think customers in Arizona would realize analogous savings if Qwest were allowed to compete.

Permitting Qwest to enter long distance would increase customer choice and competition in the *local* market as well. Experience has shown that a BOC's imminent entry into the long distance market acts as a catalyst for CLECs to accelerate entry into local exchange markets. In particular, IXCs faced with the prospect of increased competition for their core long distance customers accelerate their local entry plans in a bid to retain those customers through bundled service packages. The data from New York bears this out. CLECs put their local entry plans into gear only once it became clear that Verizon's section 271 application would succeed. In the News Release announcing the FCC report entitled *Local Telephone Competition: Status as of December 31, 2000*, released May 21, 2001, the FCC concluded:

> CLECs captured 20% of the market in the State of New York — the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2 million lines the prior year — an increase of over 130% from the time the FCC granted Verizon's long distance application in New York in December 1999 to December 2000.[150]

Furthermore, data recently released by the New York State Public Service Commission reveal that the number of local exchange lines served by CLECs more than doubled from 1999 to 2000 (from 9.8 to 20.9 percent) following the grant of Verizon's section 271 application; and, for the first time since the New York PSC began collecting these statistics, more CLEC access lines were dedicated to residential customers (52 percent) than to business customers (48 percent).[151]

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149 *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001.

150 News, *Federal Communications Commission Releases Latest Data on Local Telephone Competition*, Federal Communications Commission, May 21, 2001.

151 *See 2000 Competitive Analysis: Analysis of Local Exchange Service Competition in New*

In total, New York consumers will save an estimated $700 million annually on long distance and local telephone service.[152] Similarly impressive statistics have been reported for Texas, where "CLECs have captured 12% of the market in Texas, gaining 644,980 end-user lines in the 6 months after the FCC granted SBC's section 271 application — an increase of over 60% in customer lines since June 2000."[153] Permitting Qwest to enter the interLATA market should have a similar effect in Arizona, enabling customers to obtain expanded benefits of local competition.

B. Qwest Has Provided Adequate Assurances That Its Local Exchange Market Will Remain Open to Competition After Section 271 Approval.

The FCC's public interest analysis also considers whether the BOC has provided adequate assurance that the local exchange market will remain open after the application is granted.[154] The FCC has consistently noted that, while it has "never required" a BOC to provide a performance assurance plan, if a BOC chooses to develop one, the plan will constitute "probative evidence" that the BOC will continue to meet its section 271 obligations and that its long distance entry is consistent with the public interest.[155]

Qwest has developed a robust performance assurance plan (the "QPAP") for Arizona that, among other things, provides rigorous performance measurements, a sound statistical

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York State, New York State Public Service Commission, December 31, 2000, at 3, 4.

152 *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001.

153 *See* News, *Federal Communications Commission Releases Latest Data on Local Telephone Competition*, Federal Communications Commission, May 21, 2001.

154 *See Bell Atlantic New York Order* at ¶¶ 422-23; *SBC Texas Order* at ¶¶ 416-17.

155 *Bell Atlantic New York Order* at ¶ 429 ("Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval."); *SBC Texas Order* at ¶ 420.

methodology, and self-executing payments to CLECs and to the state. Qwest, CLECs, and the Arizona Corporation Commission have been engaged in a series of performance assurance plan collaborative workshops in Arizona since July 2000. The purpose of those workshops was to discuss the adequacy of the QPAP and to gain as much consensus as possible among the parties. These workshops have concluded, and the Commission Staff is expected to release a draft recommendation in the near future.

Moreover, the QPAP will not be the only safeguard against backsliding. The most significant assurance of future compliance beyond Qwest's Plan is the FCC's enforcement authority under section 271(d)(6).[156] If at any time after the FCC approves a 271 application, it determines that a BOC has ceased to meet any of the conditions required for such approval, section 271(d)(6) provides the FCC enforcement remedies, including imposition of penalties, suspension or revocation of 271 approval, and an expedited complaint process. Thus, there is more than adequate assurance that Qwest's market will remain open.

AT&T suggests that Qwest cannot satisfy this prong of the public interest analysis because the QPAP process has not yet been fully completed.[157] The contention that the QPAP process underway will somehow fail to address the concerns of either the State or the CLECs is groundless. That process has given all of the parties potentially affected by the QPAP, including the CLECs, the opportunity to raise their concerns in the collaborative performance assurance plan workshops. There is simply no reason to duplicate that inquiry here. In fact, WorldCom acknowledges that the "Commission is considering an anti-backsliding performance assurance plan ("PAP") in another phase of this proceeding, and [is] not suggesting that Qwest's proposed

156 *See* 47 U.S.C. § 271(d)(6). *See also Bell Atlantic New York Order* at ¶ 429.

157 *See* Rasher Affidavit, 7 AT&T 2 at 24-27 ("Rasher Affidavit").

PAP be addressed in *this* public interest workshop . . . ."[158] Qwest has presented adequate assurance of future compliance, and this prong of the public-interest inquiry has been met.

C. No Intervenor Has Demonstrated That There Are Any "Unusual Circumstances" That Would Make Long Distance Entry Contrary to the Public Interest.

The final piece of the public interest inquiry involves a determination that there are no "unusual circumstances" that would make section 271 approval inappropriate.[159] The FCC has stated that it "may review the local and long distance markets" in a state "to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [the BOC's] application."[160] The FCC has *never* found such "unusual circumstances" to exist and has determined that there is a strong presumption that entry is in the public interest if the BOC has complied with the checklist.

The FCC has specifically identified some unavailing CLEC arguments that it will *not* count as "unusual circumstances." These include: (1) the low percentage of total access lines served by CLECs, (2) the concentration of competition in densely populated urban areas, (3) minimal competition for residential service, (4) modest facilities-based investment, and (5) prices for local exchange service at maximum permissible levels under the price caps.[161] The FCC has determined that such factors do not result from a "sin of omission or commission" on

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158 Direct Testimony of Don Price Re: Public Interest, WorldCom, Inc. (May 17, 2001), *In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, 7 WC 1 at 71:11-12 ("Price Testimony") (emphasis added).

159 *See Bell Atlantic New York Order* at ¶ 423; *Verizon Massachusetts Order* at ¶ 233.

160 *Id.*

161 *See Bell Atlantic New York Order* at ¶ 426; *SBC Texas Order* at ¶ 419.

the part of the BOC and have no place in the public interest test.[162] If the BOC has complied with the competitive checklist, it should not be punished because "[f]actors beyond [its] control, such as individual competitive LEC entry strategies," result in low CLEC customer volumes.[163] CLECs' complaints that they cannot realize a sufficient profit on their services are likewise irrelevant, since "incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin."[164] Finally, "isolated instances" of service quality glitches or noncompliance do not affect the public interest inquiry.[165]

The CLECs participating in this proceeding make no pretense of following the FCC's section 271 orders. Instead, they have presented a random grab-bag of complaints, most of which have nothing to do with section 271 at all, and many of which the FCC has already expressly held to be irrelevant to a section 271 application. None of these constitutes the "unusual circumstances" that could overcome the strong presumption that Qwest's checklist compliance makes its entry into long distance consistent with the public interest.

1. ***UNE and retail pricing.*** AT&T and WorldCom both suggest that Qwest's UNE prices do not allow them to make enough of a profit in the residential market.[166] For example, AT&T argues that, because "UNE rates are so high when comparing cost to retail rates . . . CLECs cannot compete with Qwest for residential customers using the UNE-Platform."[167]

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162 *Bell Atlantic New York Order* at ¶ 427.

163 *Verizon Massachusetts Order* at ¶ 235; *SBC Kansas/Oklahoma Order* at ¶ 268.

164 *SBC Kansas/Oklahoma Order* at ¶ 65.

165 *Id.* at ¶ 281. *See also Bell Atlantic New York Order* at ¶ 50 (holding that "anecdotal" evidence of "isolated incidents" is insufficient to prove "that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements" of section 271).

166 *See* Rasher Affidavit, 7 AT&T 2 at 7-9; Price Testimony, 7 WC 1 at 24:10-36:19.

167 Rasher Affidavit, 7 AT&T 2 at 7.

Notably, neither of these CLECs suggests that Qwest is charging anything for UNEs or retail services other than the prices that have been approved by the Commission in separate cost dockets. Nor do they suggest that Arizona has failed to follow the Telecommunications Act's pricing methodology for UNEs. Any such argument would be beyond the scope of this proceeding.

If Qwest is charging UNE prices that the Commission has found to comply with the Act, and if those Act-determined prices do not enable the CLECs to achieve the profit margins they wish in light of Qwest's state-set retail prices, that is not Qwest's fault: "[I]ncumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin."[168] In the *Verizon Massachusetts Order*, the FCC made clear that whether UNE rates provide CLECs a sufficient profit margin to make UNEs an attractive entry strategy "is not part of the section 271 evaluation" at all.[169] Thus, the FCC has specifically rejected AT&T and WorldCom's argument *twice* prior to this proceeding, and for them to continue presenting it in direct defiance of the FCC's explicit orders borders on the irresponsible. The only relevant question is whether the BOC's UNE prices follow the Act's specified cost-based methodology, a question for another docket: "The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market."[170] The FCC further noted that this type of argument would draw the FCC well beyond its jurisdiction and the appropriate scope of a section 271 proceeding:

> Conducting a profitability analysis would require us to consider the level of a state's retail rates, because such an analysis requires a comparison between the UNE rates and the state's retail rates. Retail rate levels, however, are within the

168 *SBC Kansas/Oklahoma Order* at ¶ 65.

169 *Verizon Massachusetts Order* at ¶ 41.

170 *Id.*

> state's jurisdictional authority, not the Commission's. Conducting such an analysis would further require a determination of what a "sufficient profit margin" is. We are hesitant to engage in such a determination.[171]

Similarly, in the *Kansas/Oklahoma Order*, the FCC held as follows:

> Parties also assert that the Oklahoma promotional UNE rates are so high that no competitive LEC could afford to use the UNE platform to offer local residential service on a statewide basis. *Such an argument is irrelevant.* The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a state's retail rates, something which is within the state's jurisdictional authority, not the Commission's.[172]

The FCC specifically declined to consider this argument in the context of the public interest inquiry, suggesting that it is no more appropriate to consider the argument here than in any other part of section 271.[173] Also, the very language of the cited paragraphs of the *Verizon Massachusetts Order* and the *SBC Kansas/Oklahoma Order* makes clear that the issue of CLEC profit margins with UNEs has no place in any part of these determinations under section 271 or other provisions the Act. The FCC has clarified that CLEC profit margins are "not part of the

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171 *Id.* (footnotes omitted).

172 *SBC Kansas/Oklahoma Order* at ¶ 92 (citations omitted) (emphasis added). *See also Verizon Massachusetts Order* at ¶ 41.

173 *See SBC Kansas/Oklahoma Order* at ¶ 281 (dismissing in the public interest section of the order AT&T's argument regarding insufficient profit margins with then-current UNE-P rates, and stating that such profit margins are irrelevant to a public interest analysis for the same reasons the FCC gave in the section addressing pricing issues). *See also id.* at ¶ 92 ("The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a state's retail rates, something which is within the state's jurisdictional authority, not the Commission's.").

In defending the *SBC Kansas/Oklahoma Order* to the D.C. Circuit, the FCC noted that AT&T's argument boils down to a claim "that the FCC should not allow a BOC to enter the long distance market unless the BOC has adopted UNE rates that guarantee a certain level of competitive entry in the local exchange market. When some of the appellants made a similar argument to Congress, both the House and the Senate specifically declined to incorporate this sort of 'market share' test into section 271. Appellants cannot now win through litigation what they could not obtain through legislation." Brief for Appellee, *Sprint Communications Co. v.*

section 271 evaluation,"[174] and that, in considering what "the Act" requires, CLEC profit margins with UNEs are "irrelevant."[175] The terms "section 271 evaluation" and "the Act" clearly encompass all facets of this proceeding. In sum, now that the FCC has rejected their argument multiple times, the intervenors have no basis for raising it once again.

2. ***Intrastate access charges.*** AT&T also alleges that Qwest's intrastate access charges would give it such an advantage in the long distance market that Qwest's entry could not be in the public interest.[176] First and foremost, the FCC has never once reviewed a BOC's access charges as part of a section 271 application, nor has it ever conditioned a BOC's entry into the long distance market on reforming access charges. AT&T's professed concern that Qwest's section 272 interLATA affiliate, Qwest Communications Corporation ("QCC"), will have some unfair advantage if access charges are not reduced. AT&T's argument ignores that, by the very terms of the Telecommunications Act of 1996, QCC must pay exactly the same access charges as any other interexchange carrier.[177] Therefore, QCC will not obtain any unfair advantage. The FCC has concurred and determined that the separation and nondiscrimination provisions of section 272 provide adequate safeguards against an effort by an ILEC to obtain an

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FCC, No. 01-1076 at 32 (D.C. Cir. filed June 14, 2001).

174 *Verizon Massachusetts Order* at ¶ 41.

175 *SBC Kansas/Oklahoma Order* at ¶ 92.

176 *See* Rasher Affidavit, 7 AT&T 2 at 9-12.

177 *See* 47 U.S.C. § 272(e)(3). Section 272(e)(3) provides that a BOC "shall charge the affiliate . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service." 47 U.S.C. § 272(e)(3). *See also* Rebuttal Affidavit of Marie E. Schwartz RE: 272, Qwest Corporation (May 29, 2001), *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 272 of the Telecommunications Act of 1996*, Docket No. T-00000B-97-238, 7 Qwest 2 at 21:17-19 ("The BOC [Qwest] charges the 272 Affiliate the same prices that the BOC would charge any other carrier and does charge its non 272 affiliates. Therefore, there is no issue of discrimination.").

unfair competitive advantage by discriminating against unaffiliated IXCs, either by allowing their long distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long distance service to below cost.[178] Specifically, the FCC held:

> Contrary to the concerns of some parties, the temporary constraint at issue here should not allow incumbent LECs that provide in-region long distance service to engage in "price squeezes" or other anticompetitive practices, either by allowing their long-distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long-distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long-distance services to below cost. Incumbent LECs seeking to provide interLATA services through an affiliate must adhere to certain structural separation and nondiscrimination requirements. For example, Congress anticipated that some Bell Operating Companies ("BOCs") would obtain authorization under 47 U.S.C. § 271 to originate in-region long distance services before the completion of access charge reform (which includes reform not just of charges for the special access services at issue here, but also of charges for ordinary switched access as well). Congress therefore enacted Section 272, which requires a BOC competing in the in-region long distance market to create a separate long distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers.
>
> As we have consistently determined, those structural and non-discrimination requirements provide adequate safeguards against any effort by an incumbent to obtain an unfair competitive advantage in the long-distance market by discriminating against unaffiliated IXCs or by improperly allocating costs or assets between itself and its long-distance affiliate.[179]

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178 *See* Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, ¶¶ 19-20 (2000); *see also* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd. 21,905, ¶ 258 (1996) (rejecting assertion that FCC should impose additional requirements concerning possible predatory pricing other than section 272's separation and nondiscrimination provisions because "adequate mechanisms are available to address this potential problem").

179 *Id.* (citations omitted).

The FCC has plainly heard the CLECs' concerns in this area and rejected their proposed remedies.

Testimony and documentary evidence presented in the Arizona workshop establish that Qwest is fully prepared to comply with the structural and nondiscriminatory requirements of 272 and to treat QCC like any other long distance carrier.[180] The FCC has specifically rejected CLECs' requests. Since the requirements of section 272 require Qwest's 272 affiliate to be billed for, and to pay, the same access charges as any other long distance carrier, and since Qwest has confirmed that it will abide by these requirements, there is no need to stretch the public interest inquiry to reach this issue.

3. ***Qwest's alleged anti-competitive behavior.*** AT&T and WorldCom also proffer a disjointed series of federal and state complaint proceedings — many of which do not even involve events in Arizona[181] — in the hopes of creating the impression that Qwest is somehow a compulsive bad actor that the Commission may *never* find to be in compliance with section 271.[182] The CLECs are throwing dust. Whether Qwest is in fact complying with the market-opening requirements of the Act will be determined on the basis of the factual record developed in the workshops devoted to checklist compliance, not on the basis of hyperbolic assertions regarding some alleged "monopoly mindset."[183] Moreover, there is less to AT&T's

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180 *See, e.g.*, Affidavit of Marie E. Schwartz RE: 272, Qwest Corporation (March 26, 2001), *In the Matter of U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000B-97-238, 7 Qwest 1 at 25:8-9 ("The BOC [Qwest] is committed to providing its services to the 272 Affiliate on a nondiscriminatory basis.").

181 *See, e.g.*, Rasher Affidavit, 7 AT&T 2 at 16-21; 6/12/01 Tr. at 286:22 to 288:12 (testimony of Mary Jane Rasher); Price Testimony, 7 WC 1 at 40:5-43:4.

182 *See* Rasher Affidavit, 7 AT&T 2 at 12-21; Price Testimony, 7 WC 1 at 37:23-45:3.

183 Price Testimony, 7 WC 1 at 38:1. AT&T concedes that "the specifics of Qwest's anti-

and WorldCom's lists than meets the eye: Qwest has settled most of the disputes cited, including those with SunWest and Rhythms, to the satisfaction of the complaining CLECs. WorldCom admits that "many of the examples" it cites of Qwest's supposed "continuing monopoly mindset" in fact "were ultimately resolved."[184]

Nor do the various FCC proceedings AT&T cites prove anything.[185] Each of the three FCC cases cited by AT&T involved a good-faith view by U S WEST (and, in two cases, by Ameritech as well) that an offering did not involve it in the provision of interLATA service.[186] None of these cases involved anything more than a dispute about the scope of the term "provide"

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competitive behavior . . . are being discussed at length in the checklist workshops, so I will not go into the details here." Rasher Affidavit, 7 AT&T 2 at 16.

184 Price Testimony, 7 WC 1 at 38:25.

185 *See* Rasher Affidavit, 7 AT&T 2 at 12-15.

186 The Buyer's Advantage case, for example, involved whether the prohibition in section 271 against "provid[ing]" interLATA services could be read to extend to programs by U S WEST and Ameritech in which those BOCs marketed (but did not transmit) an independent third party provider's interexchange service. On review, the D.C. Circuit upheld the FCC's "case-by-case judgment[]" that it could be so read as reasonable (and therefore entitled to judicial deference). *U S WEST Communications, Inc. v. FCC,* 177 F.3d 1057, 1061 (D.C. Cir. 1999), *cert. denied,* 528 U.S. 1188 (2000) ("*U S WEST v. FCC*").

The calling card programs developed by U S WEST and Ameritech involved similar analyses of whether these BOCs would be deemed to be "provid[ing]" interLATA service by marketing a calling card for use with an independent third party provider's interexchange service. *See* Memorandum Opinion and Order, *AT&T Corp., v. U S WEST Communications, Inc.*, 16 FCC Rcd 3574 (2001).

Finally, U S WEST's National Directory Assistance program involved the question whether providing nonlocal directory assistance from an out-of-region data base — which would have been permissible under section 271(g)(4) had the data base been owned by U S WEST itself — so qualified where the data base was owned by a third party. *See* Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21,086 (1999) ("*DA Order*"). The FCC has specifically rejected AT&T's argument that the BOCs' provision of national directory assistance services should cause them to fail the public interest test. *See Bell Atlantic New York Order* at ¶ 445. Qwest was allowed to provide non-local directory assistance in-region where Qwest owned the database. The only reason that the FCC disallowed Qwest's provision of non-local directory assistance out-of-region was because Qwest did not actually own the out-of-

as used in section 271 — which the D.C. Circuit recognized in the Buyer's Advantage case has no plain meaning in this context,[187] and which the FCC interpreted not to mean the same thing as used in section 275, and upon which the BOCs had relied.[188] Whatever the merits of these past statutory disputes, they have no relevance today. As AT&T acknowledges,[189] the primary concern with a BOC offering an interLATA service prematurely is that it may blunt the BOC's incentives to go through the work of opening its markets and demonstrating compliance in a full section 271 proceeding. The only reason the Arizona workshop process is occurring, of course, is that Qwest is in fact committed to pursuing the full section 271 process. The FCC has specifically recognized that the post-merger Qwest has "a greater incentive than the pre-merger US West to satisfy section 251 so that it can comply with section 271 and re-enter the in-region long distance market and serve Qwest's national corporate customers that require services in the US West region."[190] Whether Qwest has sufficiently opened its markets today to competition will be determined on the record developed in the checklist compliance workshops, not by reference to past cases.[191]

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region database. *See DA Order*.

187 *See U S WEST v. FCC*, 177 F.3d at 1058 ("The statutory term 'provide' appears to us somewhat ambiguous in the present context.").

188 *Id.* at 1060-61.

189 *See e.g.*, Rasher Affidavit, 7 AT&T 2 at 28-29.

190 Memorandum Opinion and Order, *Qwest Communications International Inc. and U S West, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 5376, ¶ 2 (2000) ("*Qwest Merger Order*").

191 Ms. Rasher also alleges that reviews of Qwest's April 16, 2001, Auditor's Report and merger approval certification filed with the FCC on the same day demonstrate that Qwest violated section 271 "[t]hrough its branding of in-region interLATA transport services as its own." Rasher Affidavit, 7 AT&T 2 at 14. This matter is currently under review by the FCC, which is the appropriate forum for resolving any issue relating to the audit, and not a section 271 proceeding. *See Verizon Connecticut Order* at ¶ 79 (noting that "Verizon's compliance with the

4. ***Structural separation.*** AT&T and WorldCom suggest that the Commission should take the public interest inquiry as an opportunity to effect a massive corporate restructuring of Qwest, akin (by their own characterizations) to the 1984 break-up of AT&T.[192] They specifically ask the Commission to order Qwest to "establish[] a corporate structure that would separate Qwest's retail and wholesale activities into two separate subsidiaries" and "to establish a retail company with independent management that would interact with the wholesale company on [an] arm's length . . . basis."[193] While AT&T and WorldCom do not delineate the precise bounds of the Commission remedy they are seeking, this structural separation would presumably be limited to Qwest's network and operations in Arizona.

AT&T and WorldCom never *once* identify the provision of state or federal law that purportedly authorizes the Commission to condition the grant of a federal section 271 application on a forced corporate restructuring. Simply put, there is none. Nothing in section 271 or any other section of the federal Telecommunications Act authorizes state commissions to invent new structural separation requirements beyond the short list of separate affiliate obligations Congress enumerated, and no FCC order has ever required involuntary corporate restructuring as a condition of section 271 authorization. No such authority is found in Arizona law either.

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conditions of the Bell Atlantic/GTE merger ... [would] be appropriately addressed in the Commission's detailed review of the audit findings").

In any event, AT&T is grasping at straws: This matter involved a simple billing error, not a violation of section 271. As Qwest has stated to the FCC, the error involved services provisioned by Touch America (not Qwest). The services were erroneously billed in the name of Qwest. Qwest did not provision the services, did not market them or obtain any material benefits associated with packaging them with local service, did not hold itself out as the provider of them, and did not perform any other functions of an interexchange carrier.

192 *See* Rasher Affidavit, 7 AT&T 2 at 30; Price Testimony, 7 WC 1 at 63.

Involuntary structural separation would force Arizona consumers to bear the costs of a duplicative corporate structure, wasteful administrative overhead, and an inefficient division of Qwest's integrated multistate operations into insular Arizona-specific retail and wholesale entities. In fact, no state anywhere has found AT&T's proposal for structural separation to be worth the massive costs it imposes, and every state commission to consider this proposal has rejected it.

a. The Commission has no authority under federal law to impose involuntary structural separation as a precondition to granting a section 271 application.

Neither AT&T nor WorldCom can point to any provision of section 271 that authorizes structural separation, nor can they point to any FCC section 271 order that has even *hinted* that such far-reaching authority might lurk somewhere within the until-now unassuming public interest inquiry. Congress enumerated two, and only two, separate entity requirements in Title II of the 1996 Act: the interLATA services and manufacturing affiliate requirement of 47 U.S.C. § 272, and the electronic publishing affiliate rules of 47 U.S.C. § 274, which have since sunset.[194] Congress made compliance with the section 272 rules an express condition of section 271 relief.[195] These provisions "evidence[] Congress' considered judgment as to when" a BOC must "provide telecommunications services through an affiliate."[196] Given Congress's specificity regarding the limited separate affiliate requirements of section 272 and its express

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193 Rasher Affidavit, 7 AT&T 2 at 30-31, 38.

194 *See* 47 U.S.C. § 274(g)(2).

195 *Id.* § 271(d)(3)(B).

196 *Association of Communications Enters. v. FCC*, 235 F.3d 662, 667 (D.C. Cir. 2001). In *Association of Communications Enters.*, the D.C. Circuit held that the Act's express provisions regarding separate affiliates were exclusive, such that the FCC was barred from authorizing the creation of additional kinds of less-regulated affiliates. *Id.* at 667-68.

incorporation of those requirements in section 271(d)(3)(***B***), it strains credulity to suggest that an *even broader* authority to order separation for *all* local exchange services is hidden somewhere in section 271(d)(3)(***C***)'s public interest test.

Nor does any other section of the Act contain the authority AT&T and WorldCom are positing. The entire premise of section 251 is that the same ILEC corporate entity will be providing both wholesale and retail local service. Section 251(c)(4), for example, requires "each incumbent local exchange carrier . . . to offer for resale at wholesale rates any telecommunications service that *the carrier* provides at retail to subscribers who are not telecommunications carriers."[197] "The carrier" that provides services "at retail" is the same one that offers its services "at wholesale rates" to be resold. Section 251(c)(3) requires this same entity to provide unbundled network elements at wholesale.[198] Congress clearly expected that the ILEC's retail and wholesale entities would be one and the same, which is why the idea of structural separation for local services never appears once in Congress's detailed regulatory scheme — or in the FCC's thousands of pages of orders implementing that scheme.

What few citations to federal authority AT&T and WorldCom do provide are at best irrelevant and worst disingenuous. AT&T relies almost exclusively on the fact that the FCC permitted SBC and Ameritech, and Bell Atlantic and GTE, to provide advanced services through a separate affiliate after their respective mergers.[199] What AT&T neglects to tell the Commission, however, is that the merging parties' separate affiliate commitments were *entirely voluntary*, and that the FCC allowed the parties to create these advanced service affiliates *in*

197 47 U.S.C. § 251(c)(4)(A) (emphasis added).

198 *Id.* § 251(c)(3).

199 *See* Rasher Affidavit, 7 AT&T 2 at 32-33.

exchange for exempting the affiliates from section 251(c) altogether.[200] The FCC agreed that SBC and Verizon could dismantle the affiliates (and again provide DSL through their ILECs) if a court ever found that the affiliates would still be subject to section 251(c) notwithstanding their separation.[201] (In fact, now that the D.C. Circuit *has* so ruled,[202] SBC and Verizon are in fact dissolving these separate affiliates with the FCC's blessing.[203]) Finally, as AT&T is forced to concede,[204] these merger orders never suggested that structural separation made sense for basic local exchange service, or any service other than DSL; on the contrary, the *SBC Merger Order* expressly refused to adopt a "structural solution that isolates the BOCs from control of the local loops."[205]

In short, the orders on which AT&T bases its entire argument never suggested that an ILEC could be forced to accept structural separation over its objections, or that separation could

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200 *See* Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License* ("*Verizon Merger Order*"), 15 FCC Rcd 14,032, ¶ 274 (2000); Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14,712, ¶ 445 (1999) ("*SBC Merger Order*").

201 *See Verizon Merger Order* at ¶¶ 265, 267; *SBC Merger Order* at ¶ 445.

202 *See Association of Communications Enters.*, 235 F.3d at 668.

203 *See, e.g.*, Order, *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic And International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Dkt. No. 98-184, DA 01-1717 ¶ 2 (rel. July 19, 2001) (approving Verizon's plans to reintegrate its separate advanced services affiliate into the ILEC corporation following the *Association of Communications Enters.* decision, as originally contemplated in the *Verizon Merger Order*).

204 *See* Rasher Affidavit, 7 AT&T 2 at 32 (conceding that "the FCC refrained from requiring a structural separation for the merged companies' wholesale and retail basic exchange operations").

205 *SBC Merger Order* at ¶ 515.

be applied to all local exchange services, or that it would be appropriate to impose structural separation *on top of*, rather than *instead of*, the market-opening requirements of sections 251 and 271. Indeed, the FCC went out of its way in these orders to explain that these separate affiliate commitments, like the merging parties' other voluntary commitments, were not based in the requirements of the Act at all:

> Nor are the conditions that we adopt today intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272, or the Commission's rules, or any other federal statute. . . . All of the conditions that we adopt today are merger-specific and not determinative of the obligations imposed by the Act or our rules.[206]

For that reason, when Qwest and U S WEST merged, the FCC expressly *declined* to impose any type of structural separation requirements:

> Unlike the instant merger, we found that the SBC/Ameritech transaction raised substantial public interest harms and would significantly decrease the potential for competition in local telecommunications markets; increase incentives to discriminate; and frustrate the Commission benchmarking efforts. We find that the instant merger raises no such concerns. Absent these public interest harms, we will not impose conditions or require separate subsidiaries as the commenters have suggested.[207]

The FCC's merger orders thus do not support AT&T's arguments.

AT&T's and WorldCom's other citations are no more relevant and no less suspect. For example, both carriers proffer the FCC's endorsement of structural separation for BOC information services in the *Computer II Order*[208] without ever mentioning that the FCC

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206 *Verizon Merger Order* at ¶ 253; *SBC Merger Order* at ¶ 357.

207 *Qwest Merger Order* at ¶ 46 & n.135 (emphasis added).

208 *See* Rasher Affidavit, 7 AT&T 2 at 36-37 & nn.78, 80 (citing Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980), *aff'd sub nom., Computer and Communications Indus. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) ("*Computer II Order*")); *see also* Price Testimony, 7 WC 1 at 65-66.

repudiated that holding and abandoned structural separation after six years of experience with it.[209]

Similarly, AT&T cites the FCC's old rules for BOC provision of cellular service[210] without ever revealing that these rules were relaxed over time and will sunset altogether in four months.[211] Finally, both AT&T and WorldCom refer to the Modification of Final Judgment ("MFJ") approving the *negotiated* consent decree divesting AT&T of the BOCs without ever

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209 In its 1986 *Computer III Order*,

> the Commission determined that the benefits of structural separation were outweighed by the costs, and that nonstructural safeguards could protect competi[tors] from improper cost allocation and discrimination by the BOCs while avoiding the inefficiencies associated with structural separation. The Commission concluded that the advent of more flexible, competition-oriented regulation would permit the BOCs to provide enhanced services integrated with their basic network facilities.

Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd 6040, ¶ 10 (1998) ("*Computer III Further Remand*"); *see also* Report and Order, *Amendment of Section 64..702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, ¶¶ 89-94 (1986) ("*Computer III*"). The *Computer III Order* was reviewed by the Ninth Circuit and remanded to the FCC for a more complete administrative record; however, the court never disputed the FCC's premise that structural separation imposes significant administrative costs and efficiency losses that are unnecessary with adequate nonstructural regulation. *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). Two of the FCC's remand orders were subsequently remanded for further consideration of the non-structural safeguards the FCC had adopted in place of structural separation. *See California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994). The FCC has since tentatively concluded that the adoption of the market opening provisions of section 251 of the Telecommunications Act have made the question of non-structural safeguards for information services largely moot. *See Computer III Further Remand*, 13 FCC Rcd at 6062, ¶ 34.

210 *See* Rasher Affidavit, 7 AT&T 2 at 36, 38.

211 *See* Report and Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668, ¶¶ 27-31 (1997); 47 C.F.R. § 20.20 (f).

bothering to explain what provision of law might give the Commission the same authority as an antitrust court.[212]

b. The Commission has no authority under Arizona law to impose structural separation on Qwest.

AT&T and WorldCom do not even try to show that there could be a state-law basis for imposing an involuntary structural separation on Qwest, nor could they. The Commission lacks the power and authority under Arizona law to compel structural separation.

The Arizona Constitution defines and delineates the Commission's powers. It explicitly provides the Commission with certain duties, including those of prescribing just and reasonable rates; and reasonably regulating corporate governance, contracting and accounting methods, and for public "convenience, comfort, and safety."[213] The Constitution also permits the Arizona legislature to enlarge the Commission's powers by statute.[214]

Arizona courts have long established that these grants of power are to be construed narrowly. The explicit constitutional power vested in the Commission has been read to "refer[] only to the power given the Commission . . . to prescribe just and reasonable classifications and just and reasonable rates and charges to be made by a public service corporation."[215] Meanwhile, "[a]ny powers over public service corporations not specifically granted by the Constitution to the Commission reside with the legislature."[216] While "the legislature may

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212 *See* Rasher Affidavit, 7 AT&T 2 at 31; Price Testimony, 7 WC 1 at 62-64, 66-67 (citing *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)).

213 Ariz. Const. art. XV, § 3.

214 *Id.* § 6.

215 *Southern Pac. Co. v. Arizona Corp. Comm'n.*, 404 P.2d 692, 696 (Ariz. 1965) ("*Southern Pac.*").

216 *Burlington N. & Santa Fe Ry. Co. v. Arizona Corp. Comm'n.*, 12 P.3d 1208, 1210 (Ariz.

interfere with the management of public utilities whenever public interest demands, . . . *no interference will be adjudged by implication beyond the clear letter of a statute.*"[217]

The Arizona legislature has not provided the Commission the power to force structural separation upon Qwest. Its primary grant of power to the Commission[218] "does no more than confirm that which the Commission already possessed under the Constitution. . . . Section 40-202 means that the Commission may supervise and regulate under the authority granted by the Constitution and statutes and, in addition, has the power to do those things necessary and convenient in the exercise of the granted powers."[219] While the Arizona legislature has added a list of specific duties to section 40-202 aimed at increasing competition within the various public utility industries, these specific emendations, which do not specifically authorize the Commission to force structural separation on a communications carrier, cannot, under Arizona precedent, confer any general authority to do so.[220]

Thus the Arizona Court of Appeals has found that the Commission overstepped its bounds by ordering that a railroad build a public railroad crossing where its tracks crossed a private road, because, while a statute permitted the Commission to require that such crossings be constructed over "a street or highway," the "statute as a whole" nevertheless indicated that the legislature intended to permit Commission authority only in the case of *public* roads.[221] In another case that court similarly found that the Commission, though invested by the legislature

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App. 2000) ("*Burlington N.*").

217 *Southern Pac.*, 404 P.2d at 695 (emphasis added). *See also U S WEST Communications, Inc. v. Arizona Corp. Comm'n.*, 3 P.3d 936, 943-44 (Ariz. App. 1999) (same).

218 *See* Ariz. Rev. Stat. Ann. § 40-202.

219 *Southern Pac.*, 404 P.2d at 698.

220 *Id.*; *Burlington N.*, 12 P.3d at 1210.

221 *Burlington N.*, 12 P.3d at 1211.

with the power to issue certificates of public convenience and necessity, had erred in forcibly transferring such a certificate from one corporation to another.[222] As the court explained, "we can find no statute that specifically grants the Commission power to order the transfer of a certificate of convenience and necessity from one corporation to another," and the Commission had failed to follow proper procedure to justify the action under a more general provision permitting it to "rescind, alter or amend" its orders.[223] What is more, neither AT&T nor WorldCom can suggest a statute that conceivably could permit the Commission to order structural separation.

Arizona precedent also demonstrates that "in rendering its decision[s]" the Commission "acts judicially," and that unless it takes such action with proper regard for "due process of law," it acts unconstitutionally.[224] In *Southern Pacific*, the Commission attempted to "rearrange petitioner's train service" in order to rectify service that it considered "inadequate." As the court pointed out, "[t]he Commission's decision . . . attempts to apply petitioner's property to public use without a showing that it was necessary because the service had become inadequate. It suffers from the defect that it unconstitutionally deprives petitioner of its property without due process of law. It is a nullity."[225] In this instance, AT&T and WorldCom urge the Commission to require structural separation as a mere addendum to proceedings the hearings and evidence of which were aimed almost entirely at other issues — not at determining whether public convenience and necessity require so momentous an undertaking as structural separation. Such off-hand treatment cannot quality as constitutionally sufficient due process.

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222 *See Tonto Creek Estates Homeowners Ass'n. v. Arizona Corp. Comm'n.*, 864 P.2d 1081, 1087-88 (Ariz. App. 1993).

223 *Id.* at 1088.

224 *Southern Pac.*, 404 P.2d at 697-98.

c. Structural separation would impose massive and unnecessary costs on Arizona consumers.

A forced corporate restructuring of Qwest would impose enormous administrative costs and efficiency losses that would ultimately be borne by the consumers of Qwest's services. AT&T's and WorldCom's proposal would require Qwest to build a new corporate organization, keep extra sets of books, hire new staff, and purchase additional facilities just to interconnect with its own network — and yet this massive investment in overhead would not yield a single improvement in service or enable a single additional customer in Arizona to obtain service. Going forward, structural separation would also destroy Qwest's incentives to improve its network and deploy innovative new services making use of that network. As the FCC has recognized, it is ultimately consumers who suffer as a result of structural separation's dampening effect on innovation:

> Experience with the [*Computer II*] structural separation requirements . . . has demonstrated that those requirements hinder the introduction of enhanced services that could benefit the public by being widely and efficiently available through the BOC's local exchanges. Structural separation imposes opportunity costs by discouraging the BOCs from designing innovative enhanced services that utilize the resources of the public switched network. Such innovation losses, resulting from the physical, technical, and organizational constraints imposed by the structural separation requirements, directly harm the public, which does not realize the benefits of new offerings.[226]

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225 *Id.* at 698.

226 *Computer III Order*, 104 F.C.C.2d at ¶ 89. The FCC went on:

> We further recognize that structural separation imposes direct costs on the BOCs from the duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies . . . . These are indications of more fundamental costs of structural separation – namely, that the BOCs are unable to organize their operations in the manner best suited to the markets and customers they serve. The net result of these costs in delayed services and innovation, in direct duplicative costs, and in organizational inflexibility, is that structural separation prevents consumers from obtaining services and service combinations that they desire.

Structural separation would also prevent Qwest from being able to respond quickly and flexibly to changing market conditions to provide the services consumers want.

Worst of all, consumers would suffer these costs needlessly. The Commission will determine in other workshops whether Qwest has fully complied with section 251 and the competitive checklist and adopted an adequate performance assurance plan. By trying to insert the concept of structural separation into the public interest test, AT&T and WorldCom are suggesting that, even if the Commission finds in those other workshops that Qwest is in full compliance with every requirement of section 251 and 271, the company should *still* be forced to undertake a radical corporate restructuring just for good measure. This belt-and-suspenders approach serves no purpose at all. As detailed above, neither Congress nor the FCC has ever required involuntary structural separation *on top of* comprehensive nonstructural regulation; to the extent the FCC has ever considered structural separation under the Telecommunications Act (in the advanced services context), it was to apply *in place of* regulation under section 251. The massive costs of structural separation more than outweigh any redundant safeguards it might offer.

Given the enormous costs and consumer welfare losses structural separation would involve — as well as the absence of any legal basis for ordering it — it is hardly surprising that *no* state to consider structural separation has adopted it. Maryland, Virginia, Illinois, and Pennsylvania have already rejected AT&T's proposals.[227] In dismissing an AT&T petition to

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Id. at ¶ 91.

[227] *See, e.g.*, Order Granting Motion to Dismiss, *Joint Petition of Cavalier Telephone, L.L.C., Network Access Solutions, L.L.C., Covad Communications Co. and AT&T Communications of Virginia, Inc. for Structural Separation of Verizon Virginia Inc. and Verizon South, Inc.*, Case No. PUC010096 (June 26, 2001) ("*Virginia Order*"); Gred Edward, "Rivals' Request That Verizon Be Dismantled Is Dismissed," *Richmond Times-Dispatch*, June 28, 2001,

break up Verizon's Virginia operations, for example, the State Corporation Commission found that the federal Telecommunications Act contains "no grant of authority ... to order structural separation," and that requiring structural separation would impair Verizon's property rights under its operating certificates.[228] The SCC also found structural separation unnecessary in light of the agency's pending reviews in other dockets of Verizon's OSS systems and the general state of competition in Virginia.[229] AT&T and WorldCom concede, as they must, that their structural separation proposal has not yet found a taker anywhere in the country.[230] Accordingly, this Commission should also decline to give any credence to AT&T and WorldCom's proposal.

5. ***CLEC failures.*** AT&T, WorldCom, and e.spire all suggest that granting Qwest's application would not be in the public interest because many CLECs have recently gone bankrupt or are having trouble in the capital markets, threatening their entry plans.[231] But just as

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at B15 (discussing Maryland and Virginia decisions); Wayne Kawamoto, "Structural Separation Sunk by Illinois Legislature," *CLEC-Planet*, June 8, 2001.

While the Pennsylvania PUC initially ordered full structural separation of Verizon's operations in that state, it ultimately reversed course and rejected AT&T's proposal. *See* Opinion and Order, *Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353, Mar. 22, 2001; Opinion and Order, *Joint Petition of Nextlink Pennsylvania, Inc.*, Docket No. P-00991648 (Sept. 30, 1999), *aff'd, Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utilities Commission*, 763 A.2d 440 (Pa. Commw. Ct. 2001). The PUC did adopt a code of conduct for Verizon's wholesale and retail operations, but this was based on a Pennsylvania statute expressly granting such authority. *See* 66 Pa. C.S. § 3005(h) (authorizing state PUC to require that "competitive service be provided through a subsidiary which is fully separated from the local exchange telecommunications company"). There is, however, no equivalent statute in Arizona.

228 *Virginia Order* at 4.

229 *Id.* at 5.

230 *See* 6/12/01 Tr. at 298:16 to 300:10, 301:11-15.

231 *See* Rasher Affidavit, 7 AT&T 2 at 21-24; Price Testimony, 7 WC 1 at 19:12 to 20:18; Affidavit of David M. Kaufman Regarding the Public Interest Standards (May 17, 2001), *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, at 3 ("Kaufman Affidavit").

"incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin,"[232] nor are they required to guarantee their competitors stable stock prices in the face of a general NASDAQ rout. The fact that CLECs may choose to scale back entry plans in light of their own financial troubles has no bearing on whether Qwest has taken those actions within its power to open up its market; as the FCC has recognized, "individual CLEC entry strategies" are "beyond a BOC's control."[233]

The truth is that a number of factors explain the CLECs' troubles in the capital markets, over which Qwest has no control, including: misdirected or insufficiently focused business plans, an overall economic slowdown (which leads to the drying up of funding sources and higher lending costs), inexperienced management, too many competitors with the same business plan vying for the same market segment, and unmanaged growth. If CLECs believe that Qwest has played a role in their troubles by (in their view) failing to open its markets, those beliefs will be tested directly in the workshops evaluating Qwest's compliance with the competitive checklist. The financial health of the capital markets and of the CLECs in general should not be allowed to insinuate itself into the public interest test.

And since section 271 authorization does *not* turn on competitor market shares, as explained above,[234] the fact that a CLEC might retreat from the market altogether in this economy changes nothing. Indeed, "the Act provides for long distance entry even where there is no facilities-based competition" *at all*, underscoring "Congress' desire to condition approval

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232 *SBC Kansas/Oklahoma Order* at ¶ 65.

233 *Id.* at ¶ 268.

234 *See supra* Section I.B, text accompanying notes 20-24.

solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity."[235]

AT&T's suggestion that Qwest is somehow responsible for the CLECs' swoon in the stock markets is not credible. As FCC Chairman Michael Powell recently stated, the CLECs have nobody to blame for their problems but the capital markets and their own business plans:

> [T]he capital markets deserve a lot of culpability. I think high-yield money went chasing unsound business fundamentals. I've talked to a lot of CEOs who knew what they were about to do was not the right thing to do and they had to do it anyway. They had to grow too fast. They had to get too many markets. Their networks weren't ready for it. They knew it. But the high-yield capital market demanded that they do it. I think that's the central problem, but other things happened, too. I think that a lot of competitive companies entered the market on really inefficient and short-term business models. The other thing was regulatory arbitrage, cream-skimming, reciprocal compensation, arbitrage between different compensation mechanisms.[236]

If AT&T believes that Qwest has failed to open its markets to their detriment, those beliefs will be tested in the separate workshops assessing Qwest's compliance with the competitive checklist. There is nothing more to add here. The public interest test is not an inquiry into whether CLECs somehow deserve to be protected from BOC competition simply because of their own financial difficulties.

6. ***Qwest's Competitive Response Program.*** In comments filed with the Commission and in the workshop testimony of its representative Brad Carroll,[237] Cox Arizona Telcom has unfairly charged that Qwest's Competitive Response Program is an example of

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235 *Bell Atlantic New York Order* at ¶ 427.

236 "Powell Blames CLEC Money Woes on Lenders, Bad Business Plans," *Communications Daily*, May 23, 2001, Vol. 21, No. 100 (2001 WL 5053249).

237 *See* Cox Arizona Telcom, L.L.C.'s Comments on Public Interest (May 17, 2001), *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, 7 Cox 1 at 2-4 ("Cox Comments"); 6/12/01 Tr. at 190:9 to 191:6, 194:2 to 197:11.

"predatory pricing" that must be eliminated prior to approval of Qwest's section 271 application.[238] As explained thoroughly by David L. Teitzel, the Competitive Response Program is merely a standard incentive program designed to win back *only* those customers that have been wooed away from Qwest by CLECs — indicating by its very existence that local exchange competition exists.[239] Under the terms of the program, Qwest offers former customers a waiver of nonrecurring reconnection charges, a waiver of up to two months' recurring charges, or both, as an incentive to return their local exchange service to Qwest.[240] Most notably, all of the prices and other terms of the Competitive Response Program are contained in the Qwest tariff that has been reviewed and approved by this Commission.[241] In fact, Cox itself has a similar program.[242]

Although Qwest has succeeded in bringing back a small minority of its former customers under the Competitive Response Program, it would be gross exaggeration to suggest that this so-called win-back tariff has "eliminat[ed] the ability of a CLEC to effectively compete."[243] In fact, the continued growth of Cox's own customer base, described by Mr. Carroll as "definitely increasing," belies such a claim.[244] Finally, Qwest notes that the Competitive Response Program is financially self-sufficient, meaning that revenues generated by returning customers merely recover any charges waived by Qwest and the costs of implementing the program.[245] This is in

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238 Cox Comments at 2:11-12.

239 *See generally* Teitzel Rebuttal, 7 Qwest 17 at 9:16 to 11:13.

240 *See* Qwest's Competitive Exchange and Network Services Tariff, Section 5.2. *See also* Teitzel Rebuttal, 7 Qwest 17 at 10:17 to 11:13 (explaining that Qwest is also scrupulous in its handing of carrier-proprietary information and that it uses information about only those customers that are listed as having disconnected Qwest service for competitive reasons).

241 *See* Qwest's Competitive Exchange and Network Services Tariff, Section 5.2.

242 *See* 6/12/01 Tr. at 197:7-11 (testimony of Brad Carroll).

243 Cox Comments at 4:6-8.

244 *See supra* note 37 and accompanying text.

245 *See* Teitzel Rebuttal, 7 Qwest 17 at 10;13-16.

no way an example of predatory pricing, and it should have no bearing whatsoever on Qwest's showing that its entry into the interLATA market in Arizona is squarely in the public interest.

7. ***Other miscellaneous issues.*** Finally, the CLECs broach a number of other issues — for example, Qwest's provision of enhanced extended links and special access circuits,[246] and Qwest's operations support system ("OSS")[247] — that are wholly unrelated to the public interest inquiry. As with the QPAP, these basic checklist compliance and performance issues are the subjects of other workshops in this proceeding and should not be addressed here. WorldCom's witness in fact conceded that this was not an appropriate forum for considering Qwest's OSS,[248] and the same is true for the other aspects of interconnection the CLECs raise. The FCC's section 271 orders have addressed these types of particular interconnection disputes, not in the public interest inquiry, but in connection with the specific checklist items to which they relate.[249] It would be inappropriate and inefficient to import a duplicate layer of review into the public interest inquiry.

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246 *See* Kaufman Affidavit at 4.

247 *See* Price Testimony, 7 WC 1 at 70:21-22.

248 *Id.* at 71:7-8 ("I do not mean to suggest that this proceeding is the place to consider issues related to Qwest's OSS").

249 *See, e.g.*, *SBC Kansas/Oklahoma Order* at ¶¶ 105-06 (discussing Southwestern Bell's change management plan in the context of checklist item 2); *SBC Texas Order* at ¶ 330 (addressing availability of DSL services to non-voice customers in context of checklist item 4).

CONCLUSION

For all the foregoing reasons, Qwest respectfully asks the Arizona Corporation Commission to find that Qwest has satisfied all the requirements of 47 U.S.C. § 271(c)(1)(A) and 47 U.S.C. § 271(d)(3)(C).

DATED this 19th day of September, 2001

Respectfully submitted,

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